Supreme Court, U.S.
FILED
NOV 13 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 589

TEXAS AND NEW ORLEANS RAILROAD COMPANY, ET AL,
Petitioners,

v.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Texas and New Orleans Railroad Company[1] (herein called T&NO), Missouri Pacific Railroad Company (herein called MoPac) and The Texas Mexican Railway Company (herein called TexMex) pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

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[1] Effective October 31, 1961, under authority granted by the Interstate Commerce Commission in FD21261, T&NO was merged with Southern Pacific Company, a Delaware Corporation which succeeded to the rights, and assumed the obligations of T&NO. For convenience, Southern Pacific Company will be referred to herein as T&NO.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 307 F. 2d 151, and is printed as Appendix A hereto, *infra*, pp. 1a-27a. The opinion of the District Court for the Southern District of Texas, Houston Division, is reported at 197 F. Supp. 348, and is printed as Appendix B, *infra*, pp. 29a-39a.

JURISDICTION

Judgment of the Court of Appeals was entered on July 6, 1962. Petition for rehearing was denied with opinion on August 17, 1962. Jurisdiction rests on 62 Stat. 928, 28 U.S.C., Sec. 1254.

QUESTIONS PRESENTED

1. Whether a federal district court has jurisdiction to protect the primary jurisdiction of the Interstate Commerce Commission when a union strikes to prevent a railroad from complying with a Commission order?

2. Whether Secs. 5 and 16(7) of the Interstate Commerce Act pre-empt, repeal, or must be accommodated with, the Norris-LaGuardia Act so that a federal court would have jurisdiction to enjoin a strike by a union representing railroad employees, if the purpose of the strike is to compel the railroads to operate in a manner different from that approved and authorized by the Interstate Commerce Commission under the Interstate Commerce Act,[2] after finding that said operation was fair, reasonable and in the public interest?

3. Whether the attempt to compel the railroads to operate in a manner different from that approved and authorized by the Commission constitutes a labor dispute within the meaning of the Norris-LaGuardia Act.

4. Whether the Railway Labor Act requires the railroads to obtain union permission to put into effect operational changes approved by the Interstate Commerce Commission?

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[2] The Interstate Commerce Act, as amended, will sometimes be referred to herein as "the Act," and the Interstate Commerce Commission will sometimes be referred to as "the Commission."

STATUTES INVOLVED

1. Interstate Commerce Act, as amended by the Transportation Act of 1940, as amended: 54 Stat. 899, *et seq.*, 49 U.S.C., Secs. preceding 1, 5(2)(a, b, c, f), 5(11), 16(6), 16(7), 17(11).

2. Railway Labor Act, as amended, 48 Stat. 1191, 1197, 45 U.S.C., Secs. 153 (i, j, k, l), 156.

3. Norris-LaGuardia Act, 47 Stat. 70 *et seq.*; 29 U.S.C., Secs. 101, 104, 108.

The complete text of the above cited statutes appears in Appendix C, *infra*, page 41a-48a. Supreme Court Rule 23(1)(d).

STATEMENT

Corpus Christi, Texas, is a port city served by three railroads, T&NO, TexMex and MoPac. For some thirty years a bascule drawbridge spanning the mouth of the harbor was the only means by which T&NO entered and left the City (Tr. 82). In time, this municipally-owned bridge became obsolete (Tr. 81-83). In June, 1953, the Secretary of the Army, pursuant to his police powers over navigable waters, declared that this bascule bridge was an unreasonable obstruction to vessels (Tr. 84-85). The City, along with Nueces County and the Nueces County Navigation District, also determined that the bridge was not adequate for the vehicular traffic, although it was still satisfactory for railroad purposes (Tr. 83). Plans were made to replace the bascule bridge with a modern, high-level vehicular bridge (Tr. 84).

Although removal of the bascule bridge would result in T&NO's being cut off from its yards and its access to shippers in the port area, the railroad could hardly oppose the civic groups' efforts to modernize (Tr. 80-87). Therefore, efforts were made to effect an accommodation.

Representatives of the City of Corpus Christi, the County of Nueces, the Nueces County Navigation District, T&NO, TexMex and MoPac devised a suitable new operation plan based upon a new railroad bridge to be built some miles inland. T&NO, TexMex and MoPac agreed that certain tracks in and around the city owned by each respective railroad could be used by any of the railroads through the terminal association. This association would deliver loaded cars to yards where each railroad could receive them, and then the cars would be moved out over the respective lines (Tr. 28-36, 85-87; Exhibit 1, p. 44 (Art. VI); p. 45). T&NO and TexMex also agreed to relocate their yard facilities on the outskirts of the City and agreed to a joint terminal operation (Tr. 28-36; Exhibit 1, p. 44 (Art. II); Exhibit 11).

Of course, no change in the operation of the railroads could be made without the prior approval of the Interstate Commerce Commission, that agency having exclusive jurisdiction. (54 Stat. 908; 49 U.S.C. §5(11)) Accordingly, the railroads petitioned the Commission for approval of the new operation in accordance with the agreements made by the local governing bodies and the railroads (Tr. 264, 58-59; Exhibit 1).

A copy of the primary agreement, which formed the basis for the application to the Commission, was furnished to respondent union shortly after it was executed and months before the application was filed (Tr. 256). Respondent union, like any union in a comparable position, had the absolute right to intervene in this proceeding before the Commission (54 Stat. 916, 49 U.S.C. Sec. 17(11)). By such intervention, respondent union would have been entitled to show, if such had been the case, that the proposed change in the method of operation was not in the public interest or not in the interest of the employees involved and thus should not be approved (54 Stat. 906,

49 U.S.C. Sec. 5(2)(c)). Furthermore, respondent union would have been entitled to persuade the Commission to afford labor protection provisions in excess of the minimum required by statute (54 Stat. 905, 49 U.S.C. Sec. 5(2)(f)). Respondent union has intervened in similar proceedings many times in the past,[3] but in this instance, it, along with the other unions affected, chose to remain aloof, registering instead only a general protest (Tr. 59, Supp. 3).

After considering the application, the Commission decided that the change was in the public interest and entered an order approving the new operation (Tr. 39, 40-43; Exhibit 10). Before doing so, however, the Commission held:

> "No facts have been disclosed indicating that railroad employees will be adversely affected by any of the proposals involved herein. However, all the authorizations herein will be made subject to the same conditions for the protection of employees adversely affected by any part of the transactions involved in any of these proceedings as prescribed in *Oklahoma Ry. Co. Trustee's Abandonment, etc.*, 257 I.C.C. 177." (Tr. 38, 364, Exhibit 10).

The effect of this order, entered despite the refusal of the unions to intervene, was as follows (See 257 I.C.C. 177, 192, 197-201):

1. The railroads were required to make economically whole, for a period of four years from the effective date of the order, any employee placed in a worse position with respect to compensation or working conditions or who might be displaced entirely.
2. If an employee had not worked for the railroad as long as four years, then he would be entitled to

[3] See, e.g., Brotherhood of Railroad Trainmen v. Baltimore & Ohio Ry., 331 U.S. 519.

the benefits noted in paragraph 1 for a period equal to the time that he had been so employed.

3. The railroads were required to furnish all the affected employees with the same fringe benefits furnished regular employees, including transportation, hospitalization and pensions.

4. The railroads were required to pay moving expenses, and to indemnify any employee for any loss on the sale of his home, or the breaking of any leases or contracts of sale, if the employee were required to move his place of employment with the railroads as a result of the change in operation.

However, the Commission's finding of no adverse effect on employees was borne out since the new operation did not result in the elimination of any Trainmen jobs (Tr. 131 133), and there is no evidence that any such employee suffered any reduction in earnings.

After the Commission's order was handed down, the City cut the bascule bridge, and the railroads had no alternative but to operate in the manner approved by the Interstate Commerce Commission. The Federal District Court specifically found that from the time the City cut the bridge, the petitioners have operated in accordance with the authority granted by the Commission (Tr. 287-288).

Even before the application was presented to the Interstate Commerce Commission, negotiations had been opened by petitioners with the various unions in order to adjust the rates, rules and working conditions in the existing collective bargaining agreements to the proposed change in operations (Tr. 265-266). The collective bargaining agreements were modified to the satisfaction of every Railroad Brotherhood except the Trainmen (Tr. 265-266). The railroads invoked

the services of the National Mediation Board, which proposed arbitration, but the Trainmen declined (Tr. 63, 225-226). Notwithstanding the labor protection provisions provided by the Interstate Commerce Commission, notwithstanding the fact that no jobs were lost or pay affected, and notwithstanding the railroads' continued willingness to bargain on all rates, rules and working conditions applicable to the new method of operation, the Trainmen threatened to strike unless the railroads abandoned the method of operations approved by the Interstate Commerce Commission (Tr. 288). The Trainmen also threatened to strike over alleged "time claims" (arbitrary payments for time not worked) rather than submit these claims to compulsory arbitration as required for minor disputes by the Railway Labor Act (Tr. 289).

Relying on the adjudication by the Commission that the change in method of operation was in the public interest (Tr. 39, 40-43; Exhibit 10), and believing that the Interstate Commerce Commission had exclusive, plenary, and final jurisdiction to determine what changes in method of operation, if any, would be made, the railroads petitioned the Federal District Court for relief because of fear of the consequences of a strike by the Trainmen (Tr. 266). Jurisdiction was predicated on 28 U.S.C. Secs. 1331, 1332, 1337, 2201 and 29 U.S.C. Sec. 185.

After a hearing, the Federal District Court made this finding:

> "(3) *The strike* which the Brotherhood of Railroad Trainmen called against the three plaintiffs to start on Monday, July 10, 1961, *was for the purpose of compelling said plaintiffs to make agreements providing for operations different from those authorized by the said Commission in its Order* of November 16, 1960, and particularly in the following respects:
>
> (a) To require Texas and New Orleans Railroad Company and The Texas Mexican Railway Company to conduct separate operations, including separate

Corpus Christi Terminal Association (C.C.T.A.) operations, in the Corpus Christi Terminal instead of joint operations.

(b) To require Texas and New Orleans Railroad Company, as distinguished from C.C.T.A. to switch its former yards and industries in the Hughes Street-Taneahua Industrial area. In order to reach said tracks, yards and industries as an individual railroad, it would be necessary for Texas and New Orleans Railroad Company to operate over trackage owned by Missouri Pacific Railroad Company. Texas and New Orleans Railroad Company is permitted to use said trackage for reaching the area in question when operating the C.C.T.A., but is not permitted to use Missouri Pacific track for the purpose of reaching the area in question as an individual railroad.

(c) *To require payment by the three plaintiffs to their respective employees of various time claims* which have been filed by said employees represented by the Brotherhood of Railroad Trainmen against the three plaintiffs because of the changes in operations which occurred on, and have continued since, November 18, 1960, at Corpus Christi, Texas. At the time of the trial said time claims against the three plaintiffs were in excess of $500,000.00. *When properly processed by the Brotherhood of Railroad Trainmen under the provisions of the Railway Labor Act, these time claims will be properly referrable by the parties involved to the National Railroad Adjustment Board for decision.*" (Emphasis supplied.) (Tr. 288).

Nevertheless, the trial court denied the injunction, holding that "the Norris-LaGuardia Act bar(s) relief against a strike to prevent a railroad's complying with a contract approved by the . . . Commission pursuant to 49 U.S.C.A. Sec. 5(2)" (Tr. 271). However, the trial court granted an injunction pending appeal.

The Court of Appeals, Fifth Circuit, affirmed the judgment of the trial court. Issuance of mandate has been stayed pending action by this Honorable Court.

At all times material hereto, including the present, petitioners have been willing to negotiate with the Trainmen concerning rates, rules and working conditions applicable to the new operations approved by the Commission, which operations were necessarily inaugurated when the tracks leading to the bascule bridge were cut by the City. The failure of respondent union and petitioners to reach an agreement has been solely because of the Trainmen's insistence that petitioners make agreements providing for operations different from those found by the Commission to be fair and reasonable and in the public interest.

REASONS FOR GRANTING THE WRIT

As stated by the Court of Appeals (Appendix A, *infra*, p. 5a):

> "This suit presents a three-way conflict between major pieces of Federal Legislation; surprisingly, it appears to be a case of first impression, although all three statutes have been on the books for some . . . years . . ."

The three major pieces of federal legislation are the Interstate Commerce Act, the Railway Labor Act, and the Norris-LaGuardia Act.

The Court of Appeals concluded correctly that the basic issue in the case was the "Commission's power under Section 5 of the . . . Act and the meaning to be given to the language of Section 5(11) that the Commission's authority is 'exclusive and plenary.'" The Court then said (Appendix A, *infra*, p. 12a):

> "This pits the transportation policy of Section 5 . . . against that of Norris-LaGuardia. If it should be de-

termined that the Commission's authority under Section 5 is being frustrated by application of Norris-LaGuardia to the present suit, we would have to conclude that Norris-LaGuardia was pre-empted by section 5(11) even though section 5 is not labor legislation. The problem is by no means easy."

First, the Court erred in concluding that Section 5 of the Transportation Act of 1940, amending the Interstate Commerce Act, is not labor legislation. President Roosevelt, himself, initiated the Transportation Act of 1940, which contained Section 5(2)(f). After obtaining the recommendations of the Committee of Six, three representatives of the railroads and three of railroad labor, the President placed the legislation in the care of Senators Wheeler, Truman and Minton and Representative Lea.[4] An announced purpose of this legislation was to aid labor.[5] As Senator Wheeler himself said in an interchange with the representative of the Brotherhood of Railroad Trainmen, "we [the Congress] are changing [the national transportation policy] in favor of labor and to help labor."[6]

In line with this statement, Congress gave the Commission authority to issue orders under Section 5 binding upon railroad employees only after providing for them the following adequate protection:

1. Unions representing employees have the absolute right to become parties to proceedings which affect the employees. Section 17(11) of the Act; *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Ry.*, 331 U.S. 519.

[4] 86 Cong. Rec. 11269, 11270; 86 Cong. Rec. 5864-5. See 84 Cong. Rec. 9750. See Appendices D and E, *infra*.

[5] 54 Stat. 899; 49 U.S.C. preceding §1.

[6] Hearings on S.2009 before the Senate Committee on Interstate Commerce, 76th Cong., 1st Sess. 402 (1939).

2. The Commission is required to consider the effect of a proposed transaction on the employees involved, Section 5(2)(c) of the Act, and is required to prescribe protection for employees adversely affected by an authorized transaction, Section 5(2)(f) of the Act;

3. Unions have the right to negotiate with railroads concerning compensation, rules and working conditions to apply to the new operations resulting from approved transactions.

The legislative history of Section 5(2)(f) (See Appendix D, *infra*, p. 49a-58a) requiring the Commission to prescribe specified minimum protection for employees adversely affected by an approved transaction, shows clearly that all who participated in its enactment understood that they were evolving labor legislation and that railroad employees would be bound by Commission orders under Section 5. Mr. Harrison, testifying as a labor representative of the Committee of Six, said:

> "Labor has indicated its willingness to cooperate by saying that where it can be shown to be in the public interest, mergers ought to be effected and then we are making a sacrifice . . ."[7]

This point was put in even blunter fashion by Mr. McGrath, testifying for the Trainmen:

> "An acceptance by railroad labor of the provisions concerning unification which are now proposed cannot but be construed as a tacit agreement on the part of railroad employees that mergers, consolidations, coordinations, and so forth, may be freely made, so long

[7] Hearings on H.R. 2531 and H.R. 4862 before the House Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess. 1292.

> as the interests of labor are 'considered' and some sort of supposed protection given to their interests . . ."[8]

The only questions giving rise to debate were: (1) would the Commission be authorized to approve transactions which affected employees adversely, and (2) if so, how much protection should be given the employees. It is highly significant that the proposed Harrington amendment, which the Trainmen sought unsuccessfully to have included in Section 5, contained a provision that the Commission should not approve any transaction which would result "in the impairment of existing employment rights of . . . employees" (Appendix D, infra, p. 54a). This proposal was defeated, Congress refusing to place this drastic limitation on the authority of the Commission. During the final debate in the House on the passage of the bill which became the Transportation Act of 1940 containing what is now Section 5(2)(f), Mr. Wolverton said:

> "[I]t was recognized that the real intent of the sponsors [of the original proposals] was to save the railroad employees from being suddenly thrust out of employment as the result of any consolidation or merger entered into . . . . In fact, the provisions contained in the original bill had the approval of 20 out of the 21 railroad brotherhoods. And, it is significant in this connection that the one brotherhood [the Trainmen] which did not agree to our language had never asked for anything other than that the entire consolidation provision be left out of the bill *and the matter be left at this time as a matter for collective bargaining.*" (Appendix D, *infra* p. 57a-58a) (Emphasis Supplied).

The effect of the Court of Appeals' opinion is to make transactions covered by Section 5 matters to be left for collective bargaining. This is what the Trainmen failed to

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[8] Hearings on H.R. 2531 and H.R. 4862 before the House Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess. 1292.

obtain from Congress in 1940 when the present federal transportation policy was enacted. Thus, the Court of Appeals has given the Trainmen, through judicial construction, what they failed to obtain through legislative enactment.

But, whether Section 5 is labor legislation or legislation governing administrative power, the Court of Appeals erroneously concluded that there is no conflict between Section 5 of the Act and Norris-LaGuardia such as to require repeal of one or accommodation of the two. This conclusion was based upon three distinct errors.

First the Court of Appeals erred by failing to distinguish between (a) *methods of operation*, which require Commission approval and thereafter are not a proper subject for collective bargaining; and (b) *rates of pay, rules and working conditions*, concerning which the Trainmen had and have the right to negotiate with petitioners. In this connection, there can be no doubt that the present dispute is not over the contents of a collective bargaining agreement, but rather over the contents of an order of the Commission. Petitioners do not now, and never have, disputed the right of the Trainmen to bargain on rates of pay, rules, and working conditions incident to the new operations. On the other hand, the Court of Appeals expressly recognized that the change in operations demanded by the Trainmen is a matter which,

> ". . . both on the law and the facts, if litigable at all, is within the primary jurisdiction of the Interstate Commerce Commission." (Appendix A, *infra*, at page 19a-20a.)

The failure of the court to grasp this distinction clearly appears from its repeated statements that petitioners used

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[9] See cases cited at note 13, *infra*.

the Commission order to establish, unilaterally, a new collective bargaining agreement. This simply is not so. The application presented to the Commission was solely concerned with the matter over which the Commission has exclusive and plenary jurisdiction, namely the proposed change in operations. This application did not contain a single provision of a new labor agreement.

Secondly, because of its failure to grasp the distinction just noted, and because of its notion that the employees had, before the Commission, only a "weak voice of protest," the Court of Appeals was led to ignore the specific language of Section 16(7) of the Interstate Commerce Act:

> "It shall be the duty of every common carrier, its agents *and employees*, to observe *and comply* with such orders [of the Commission] so long as the same shall remain in effect." (Emphasis Supplied.)

If this statute has any meaning at all, the order of the Commission in this case is binding upon the employees as well as upon the railroads involved. When the City cut the tracks over the bascule bridge, the railroads and the railroad employees had no alternative but to operate in accordance with the lawful order of the Commission. Furthermore, it would be physically impossible to continue to operate in accordance with the prior plan of operations.

As has been noted before, a labor union has the absolute right to intervene before the Commission to see to it that labor's interests are protected. This provision for intervention was inserted at the specific request of labor. It is significant that in his testimony on this point before the House Committee, the Trainmen's General Counsel, Mr. McGrath, stated:

> "Every consolidation or co-ordination is bound to have an adverse effect on railroad labor, to a greater or less extent, depending upon its magnitude. We are

> opposed to any arrangement which may keep labor or the public in the dark until after the damage resulting from unifications has been done."[10]

In furtherance of the policy of giving labor an absolute right to intervene, Congress provided that the Commission would be bound to take into account the effect of a proposed order on the interests of labor and to require specific measures for the protection of labor (Section 5(2)(e,f)). Furthermore, Congress provided that if labor is not satisfied with the protection afforded by the Commission, labor is free to negotiate for still greater protection (Section 5(2)(f)). In the light of these carefully prescribed safeguards, Section 16(7) stands as an integral and necessary part of the orderly processes established by the Act, and must be enforced.

Finally, the court erred in concluding that the employees involved had lost $500,000 in wages because of the change in operations. The fact is that the employees did not lose $500,000 or any other amount in wages as a result of the changed operations. If any employee had lost his job or suffered a reduction in pay as a result of the change in operations, he would be made whole for a period of four years (or for such lesser time as he had been employed) under the Oklahoma conditions prescribed by the Commission under Section 5(2)(f) of the Act. The Court of Appeals' reference to more than $500,000 of lost wages resulted from a misconception of the time claims filed by the employees which claims totaled more than $500,000 at the time of trial. These claims constituted minor disputes under the Railway Labor Act and were claims for penalties, of a day's pay each, for work *not performed*, and

[10] Hearings on H.R. 2531 and H.R. 4862 before the House Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess. 1293.

were in addition to the wages paid the employees for services *actually rendered*. These penalty claims have no relation to what an employee earns now and what he earned before the bascule bridge was cut (Tr. 193, 165-168).

The questions involved herein are substantial and important. Although Congress vested in the Commission "exclusive and plenary" authority under Section 5(11) of the Interstate Commerce Act to approve and authorize the new operations which petitioners put in effect when the tracks to the bascule bridge were cut, and although those operations were approved and authorized by the Commission, the Court of Appeals held that the order of the Commission is not binding on the Trainmen and the employees represented by them, and they are free to strike to compel a change in said operations. *This decision nullified the Commission's exclusive jurisdiction.* Why require the Commission to find that a proposed transaction is fair and reasonable and in the public interest, and why exempt the railroads and employees from the antitrust laws, the Railway Labor Act,[11] and other restrictions in carrying out a transaction, if a union can nullify an approved transaction through economic pressure? The Court of Appeals recognized that its decision placed petitioners "in an insol-

[11] Chicago and Northwestern Ry. v. Brotherhood of Locomotive Engineers, 202 F. Supp. 277, 284 (D.C. Iowa). Before adopting Section 5 (11) in its present form, Congress had before it H.R. 2531, which provided in part that while in carrying out orders of the Commission railroads were relieved of "restraints or prohibitions of law, State or Federal," nevertheless "[N]othing herein shall be construed to repeal, amend, suspend or modify any of the requirements of the Railway Labor Act, as amended, or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act" (Appendix E, *infra*, p. 60a). Congress refused to provide that a transaction approved by the Commission could be carried out only in compliance with all of the requirements of the Railway Labor Act.

uble dilemma" of either making operational changes demanded by the Trainmen, for which petitioners could be prosecuted, "or hopelessly to sit out a crippling strike" (Appendix A, *infra*, p. 18a).

In effect, the Court of Appeals concluded that Congress meant nothing by Section 5 of the Interstate Commerce Act and really intended to leave all transactions covered thereby to negotiations between railroads and unions without interference from the Interstate Commerce Commission representing the public interest.

A principal purpose of the Transportation Act of 1940, as well as its predecessors, was to improve the economic health of the nation's transportation system by fostering the consolidation and co-ordination of the many railway systems in order to produce operating economies, while at the same time protecting the interests of railroad employees.[12] The Court of Appeals' decision frustrates that purpose, and nullifies the purpose and effectiveness of the Commission. Further, it substitutes economic warfare for the orderly administrative processes provided by Congress, and gives unions the right, after participating as parties before the Commission and having had their day in court, to ignore both the Commission's decision and the public interest served thereby.

The result in the instant case is all the more egregious since the Trainmen did not even bother to appear before the Commission to show that the change was not in the public interest or that labor was not adequately protected. Instead, after the order had been entered, and the City

[12] "It is hereby declared to be the national transportation policy of the Congress . . . to promote . . . economical, and efficient service and foster sound, economic conditions in transportation . . . and to encourage fair wages and equitable working conditions. . . ." 54 Stat. 899, 49 U.S.C. preceding §1.

had cut the bridge, the Trainmen threatened to strike unless the Commission's order was disobeyed. At the very least, this action constitutes a collateral attack on the jurisdiction of the Commission to regulate the railroads.

The Court of Appeals agreed "that Norris-LaGuardia was pre-empted by Section 5(11)" if "the Commission's authority under Section 5 is being frustrated by the application of Norris-LaGuardia to the present suit." The present case presents as clear a case as may be conceived of frustration of Commission authority and congressional intent. This Honorable Court has not been slow to reconcile Norris-LaGuardia with other important federal legislation when such action was necessary to preserve an important federal policy clearly enunciated by Congress.[13] Such reconciliation is necessary here to preserve the policy announced in the Interstate Commerce Act of giving the Commission "exclusive and plenary" authority over Section 5 transactions.

If the public interest is to be served, if the jurisdiction of the Commission is to be preserved, if the intent of Congress to channel these matters into orderly administrative processes is to be followed, then the federal courts must necessarily have jurisdiction to grant the relief requested by petitioners. If not, then an order of a federal regulatory agency can be obeyed only to the extent permitted by a union.

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[13] Brotherhood of Railway Trainmen v. Chicago River & Indiana Ry., 353 U.S. 30; Graham v. Brotherhood of Locomotive Firemen and Enginemen, 338 U.S. 232; Textile Workers v. Lincoln Mills, 353 U.S. 448; Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U.S. 210; Syres v. Oil Workers International Union, 350 U.S. 192; Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768.

CONCLUSION

The questions presented by this petition are of public importance. Certiorari should be granted.

Respectfully submitted,

TOM M. DAVIS

ELMORE H. BORCHERS

PALMER HUTCHESON, JR.

APPENDIX A

Opinion of the Court of Appeals for the Fifth Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19164

TEXAS AND NEW ORLEANS RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY AND THE TEXAS MEXICAN RAILWAY COMPANY,

Appellants,

VERSUS

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL,

Appellees.

Appeal from the United States District Court for the Southern District of Texas

(July 6, 1962)

Before RIVES, CAMERON and GEWIN, Circuit Judges.

RIVES, Circuit Judge: This action was brought on July 7, 1961 by the Texas and New Orleans, the Missouri Pacific, and the Texas Mexican Railway Companies, under 28 U.S.C. §1331, to enjoin a strike by the Brotherhood of Railway Trainmen set for July 10, 1961 in Corpus Christi, Texas. On the same day the action was brought, the court below issued a temporary restraining order and set the hearing of the

motion for preliminary injunction for July 12. In an opinion dated July 21, the court concluded that the Norris-LaGuardia Act precluded injunctive relief and on July 24 denied the request for a preliminary injunction. On the same day, however, the court entered an injunction pending appeal.

The findings of fact of the district court and its conclusions of law are embodied in an able opinion reported at 197 F. Supp. 348 (S.D. Tex., 1961). The facts will be briefly summarized here. Prior to November 1960 the only rail access to Corpus Christi from the north was by the bascule bridge built in 1926 for the then current demands. Since that time the population of the area has increased some eight times and the bridge became a bottleneck to rail,* auto, and maritime traffic. In 1950 the first plans were made for a new high-level vehicular bridge and for a new railway bridge several miles further up the shipping channel. By 1955 contracts were completed with the city for the new railway bridge, and the bridge was completed in the Fall of 1959. Because of the change in location, considerable changes in operation had to be made by the railroads. These changes were incorporated in outline in a Primary Agreement between the various parties involved — the three railroad appellants, the City of Corpus Christi, the County of Nueces, and the Nueces County Navigation District No. 1. Supplemental agreements were then made in accordance with the Primary Agreement between certain of the parties — a Joint Yard Agreement between the Texas and New Orleans and the Texas Mexican and a Joint Track Agreement between the railroads and the Navigation District. The changes more specifically involved in this appeal were: (1) plans of the Texas and New Orleans and the Texas Mexican, which had hitherto conducted separate yard op-

* Word "rail" withdrawn on rehearing (Petitioners' note).

erations, to construct a joint yard under one management with joint switching service by joint crews; (2) new arrangements between the railroads and the Corpus Christi Terminal Association for servicing the port and the industries connected thereto — in particular the industries which the Texas and New Orleans had served up to that time in the vicinity of the old bascule bridge; and (3) various joint car-interchange operations among the railroads through the use of the Corpus Christi Terminal Association.

Since these agreements involved changes in the working conditions of the railroad employees, negotiations were begun with the unions in May of 1959. Agreements consistent with the Primary Agreement were eventually reached with the various nonoperating unions, the engineers and the firemen. The Railway Trainmen, however, held out. On May 4 and 5th, 1960, the railroads served Section 6 notices on the Trainmen in accordance with the Railway Labor Act, section 6, 45 U.S.C. §156, giving 30 days' notice of proposed changes in working conditions.[1] On June 15, 1960, the disputes were referred to the National Mediation Board. Under section 156 (footnote 1, supra) the proposed changes

[1] "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board." 45 U.S.C. §156.

in working conditions could not be instituted until termination of mediation.

Several months later, on October 13, 1960, an application was filed with the Interstate Commerce Commission asking for permission, pursuant to 49 U.S.C. §1 (18),[2] to abandon certain old tracks and requesting approval pursuant to 45 U.S.C. §5 (2) of the new methods of operation incorporated in the Primary and Supplemental Agreements. On October 27, the Brotherhood of Railroad Trainmen filed a protest on the ground that employees would be adversely affected. On November 16 the Interstate Commerce Commission issued a report, order of approval, and necessary certificates approving the proposed changes. The union protest was denied except for insertion of the normal labor protective provisions. Two days later the bascule bridge rails were cut. With the bridge cut and the proposed changes approved, the railroads put the primary Agreement and supplemental agreements into effect in spite of the fact that

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[2] "§1, par. (18). *Extension or abandonment of lines; certificate required; contracts for joint use of spurs, switches, etc.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks."

they were still in mediation with the Brotherhood of Railroad Trainmen over the changes in working conditions.

On November 20, 1960, the Brotherhood of Railroad Trainmen filed a suit in the federal court asking that the railroads be enjoined from putting certain of the operational changes into effect. A temporary restraining order was denied and after various preliminary moves the Brotherhood of Railroad Trainmen asked for and was granted a voluntary dismissal on June 26, 1961. Meanwhile, in May of 1961, the mediation proceedings were terminated since no agreement could be reached and the union refused arbitration. On July 6, notice of the strike giving rise to this suit was served on the railroads.

This suit presents a three-way conflict between major pieces of federal legislation; surprisingly, it appears to be a case of first impression, although all three statutes have been on the books for some 30 years or more.* Stated simply, the railroads claim that the union is threatening a strike to force the railroads to violate valid orders of the ICC; that all other federal or state laws are pre-empted by the "exclusive and plenary" authority of the ICC to approve the work changes involved; that the strike is therefore illegal, unprotected by any other legislation, and should be enjoined. The unions reply, (1) that the strike concerns a "labor dispute" within the meaning of the Norris-LaGuardia Act, 29 U.S.C. § 101 which withdraws the courts' jurisdiction to provide injunctive relief, and (2) that no injunctive relief is warranted where the railroads instituted the changes in working conditions in violation of the Railway Labor Act, 45 U.S.C. § 152 Fifth, 156, while the parties were in mediation. Also involved are time claims

* Words "30" and "or more" withdrawn on rehearing. (Petitioners' note).

totalling more than $500,000 for wages lost as a result of the changes.

The Norris-LaGuardia Act, 29 U.S.C. § 101 provides:

> "No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter."

(See also 29 U.S.C. § 104.) If this section is applicable, the railroads do not appear to contend that they have satisfied the conditions of the Act to obtain an injunction under it. They must show therefore that either (1) the section, by its own terms, is not applicable to the present dispute, (2) an express grant of jurisdiction is given in other legislation, or (3) the section is pre-empted by other legislation.

Looking first to the terms of the statute, there would appear little question that the threatened strike is over a "labor dispute." Under 29 U.S.C. § 113 (c), a "'labor dispute' includes any controversy concerning terms or conditions of employment." The railroads themselves recognized that the dispute involved such a controversy when they filed notices on the appellees in May of 1960, in accord with section 6 of the Railway Labor Act, of proposed changes in the appellee's working conditions. Some cases have spoken in terms of "no labor dispute" when in fact they were holding that the Act was not applicable for some other reason. *See, e.g., Baltimore & O.R. Co. v. Chicago River & Indiana R. Co.*, 7 Cir., 1948, 170 F. 2d 654. Others have held that there is no labor dispute where railroad unions have threatened a strike before the changes in working conditions were put into effect or before any of the steps contemplated by the

settlement machinery of the Railway Labor Act had been taken by the parties. *See Brotherhood of Railroad Trainmen v. New York Cent. R. Co.*, 6 Cir., 1957, 246 F. 2d 114. Here, the proposed changes have already been put into effect and the question of whether the Norris-LaGuardia Act is applicable will be taken up later. As a factual matter the present dispute has every attribute of a "labor dispute."

The Norris LaGuardia Act was passed with the very clear congressional intent to end injunctive interference in labor relations. To make perfectly plain that this intent was not to be frustrated by judicial construction, as had been done so often in the past, the Act went not just to the substantive law to be applied in a "labor dispute" but to the court's jurisdiction: "No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction . . . ." Thus the appellants must not deal merely with the substantive law to be applied to a "labor dispute," but they must find jurisdiction for a federal court to consider the problem. Clearly, no help is found in 28 U.S.C. §1331, the general federal-question jurisdictional section under which this action was brought. Nor is the primary section upon which the appellants rely in this action, 49 U.S.C. §5 (11), *on its face* of any greater help. This section provides:

> "The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power . . . to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized

> under the provisions of this section shall be and they are hereby relieved from the operation of the anti-trust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction . . . ."

This section relieves the carriers of the restraints and limitations of other laws, but it does not, on its face, relieve them from the action of other parties, i.e., the union's economic threat of a strike. Further, Norris-LaGuardia could not be considered as a legal restraint or limitation on the carriers and their ability to carry out an approved transaction. It is directed not at the power of the carriers to do anything but to the power of the court to grant injunctive relief. Thus section 5(11) does not, by express terms, grant the jurisdiction which Norris-LaGuardia withdrew.

One broad category of rather narrow exceptions has been made to the strictures of Norris-LaGuardia where, in the words of the Court in *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R. Co.*, 1957, 353 U.S. 30, 42, there is "the need to accommodate two statutes, when both were adopted as a part of a pattern of labor legislation." For where Norris-LaGuardia conflicted with the Railway Labor Act, the Court argued, the abuses which Norris-LaGuardia sought to remedy were no longer present since detailed congressional provisions had been made for dealing with railway "labor disputes" under the Railway Labor Act. The Court stated:

> "We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute

> and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable."

353 U.S. at p. 40. In accordance with such reasoning, the Court has allowed injunctive and equitable relief, (1) when railway unions attempt to strike over "minor disputes," *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R. Co.*, *supra*; (2) when an employer refuses to bargain with a certified union, *Virginian Ry. v. System Federation No. 40*, 1937, 300 U.S. 515; (3) when a union refuses to fairly represent members of the Negro race, *Steele v. Louisville & Nashville R. Co.*, 1944, 323 U.S. 192; and (4) to compel arbitration when the parties have agreed to settle disputes arising out of a collective bargaining contract by arbitration, *Textile Workers v. Lincoln Mills*, 1957, 353 U.S. 448.

The appellants argue that this category of exceptions is applicable in the present case. They contend that section 5 (2) (f) of the Interstate Commerce Act, 49 U.S.C. § 5 (2) (f),[3] is also part of the national pattern of labor legislation

[3] "(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees." 49 U.S.C. §5(2)(f).

and that an injunction is necessary to carry out its provisions. Section 5 (2) (f) makes it the Commission's duty to require as a condition of approval of a § 5 (2) transaction that "a fair and equitable arrangement to protect the interests of the railroad employees affected" be included. The railroads argue that this is the only protection to which the employees are entitled, that they obtained such protection in this case, and that the railroads are therefore entitled to an injunction "to preserve the obvious intention" of § 5 (2) (f). This is a difficult road to travel.

Admittedly, § 5 (2) (f) prescribes the maximum protection to which the employees are entitled from the Interstate Commerce Commission. But is the union prohibited from gaining further rights in the transaction through the use of its own economic power — the strike? The appellants are unable to come up with any express legislative history to that effect; rather, they argue that Congress "assumed" that railway labor would be unable to hold out for an understanding more in their interest. It is always dangerous to argue that Congress "assumed" anything, but there are also other considerations which make it unlikely that Congress intended § 5 (2) (f) to have such far-reaching effects. In the first place, as the Commission itself pointed out in *Chicago, St. Paul, M. & O. RR Lease*, 295 ICC 696, 701, "this section only authorizes the imposition of duties upon the carrier. It does not authorize us to direct the employees or organizations of employees to do anything." But more important, labor relations is a highly complex subject. The exceptions the courts have made to Norris-LaGuardia "to accommodate" other labor legislation have only been made where Congress, through such detailed legislation as the Railway Labor Act and Taft Hartley Act, has "channeled these economic forces [capital and labor] . . . into special processes intended to compromise them"

(353 U.S. at 41), and where these processes would be frustrated without injunctive aid. Do the processes of section 5 (2) (f) and the imposition upon the union of a minimum fair and equitable arrangement chosen without its consultation by the carrier provide a complete and proper channel for the compromise of the forces of capital and labor? Can they be compared with the machinery of the Railway Labor Act or the Labor Management Relations Act? We do not think so. The types of special processes which the courts have enforced with injunctive relief have all involved extensive negotiations and bargaining between the parties, or agreements which result from such bargaining; never processes which allow management to unilaterally choose a change in working conditions and give the union a small voice of protest if the change is unfair or inequitable. For the balancing and compromising of labor and capital ranges far beyond the minimum which is fair and equitable; it extends to such trivial sources of friction between the parties as led the Court to say in *Steelworkers* v. *American Mfg. Co.*, 1960, 363 U.S. 564, 568, in granting enforcement to an arbitration clause:

> "The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware."

We therefore conclude: (1) that Congress did not intend section 5 (2) (f) to delimit the maximum protection the employees could obtain, and (2) that the strictures of Norris-LaGuardia need not be raised to accommodate the obvious intention of section 5 (2) (f).

This leaves the basic issue of the Interstate Commerce Commission's power under section 5 of the Interstate Com-

merce Act, and the meaning to be given to the language of section 5(1) that the Commission's authority is "exclusive and plenary." This pits the transportation policy of section 5, rather than the labor policy of section 5 (2) (f), against that of Norris-LaGuardia. If it should be determined that the Commission's authority under section 5 is being frustrated by application of Norris-LaGuardia to the present suit, we would have to conclude that Norris-LaGuardia was pre-empted by section 5 (11), even thought section 5 is not labor legislation. The problem is by no means easy.

The appellants argue: (1) that it was the clear congressional intention in section 5, and particularly subsection 5 (2), to foster the voluntary consolidation and integration of the national railroads, see *St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 1954, 347 U. S. 298; (2) that the only standards for such consolidations are set down in section 5 (2), see *McLean Trucking Co. v. United States*, 1944, 321 U. S. 67; (3) that any outside interference, whether it be by legal or private action, is pre-empted, see *Texas v. United States*, 1934, 292 U. S. 522. Thus, once a transaction is approved by the ICC, the appellants conclude that the only valid restraint is the railroad's own decision not to go through with the "voluntary" transaction. Whether the cases support this view is questionable.

The essence of the appellants' objective is to unilaterally set certain provisions in a new labor contract in accord with the proposed changes in the Primary Agreement, and to be relieved of an existing labor contract without having to go through the machinery of the Railway Labor Act (the reformation procedure for railway labor contracts) or being subjected to one of the penalties for breach — a strike. They have attempted to accomplish this objective by including such detail in the Primary and supplementary agreements

submitted to the ICC for approval as to determine the major provisions of a new labor contract, although at no time were the unions brought into the negotiation of these agreements. The appellants then argue that ICC approval of the agreements makes them binding on the unions. If so, not only does section 5 give the Commission power to approve a section 5 (2) transaction, but it gives the carriers the right to legislate the terms of a continuing contract with a third party, although a different contract more favorable to the third party might have been equally acceptable to the Commission. We do not feel the statute may be so interpreted.

Section 5 (2) involves "transactions" to achieve certain stipulated ends; these transactions require the approval of the Commission. There is no definition given of what goes into a "transaction," but it appears to be a catchall descriptive term referring to the many different elements involved in mergers, leasing agreements, pooling arrangements, or joint operations. As often described in other contexts, it is a word "of flexible meaning" and "may comprehend a series of many occurrences, depending not so much upon the immediacy of their connection as upon their logical relationship." See *Cantrell v. City of Caruthersville*, Mo., 1949, 221 S.W. 2d 471, 474; *Kaumagraph Co. v. General Trade Mark Corp.*, D.C.N.Y., 1935, 12 F. Supp. 230. Apparently the Commission feels that one of the occurrences or elements involved may be contracts and agreements between interested parties to the transaction, since its regulations require that there be attached to any application for approval of a 5 (2) transaction "a copy of any contract or other written instrument entered into or proposed to be entered into pertaining to the transaction covered by the application." 49 C.F.R. § 52.3 (b) (7). It would further appear from sections 5 (2) (c) and (f) that the representa-

tives of the carrier employees are included among the interested parties to a transaction and that a new labor contract may be one of the ingredients of a transaction. Now, are we to read into the authority of the ICC to "approve" a transaction, the right of the carrier to unilaterally create one of the contracts which may be necessary to the completion of that transaction and thereupon bind a third party to it? Clearly, that does not follow as a matter of course from the normal meaning of the terms used in section 5 (2) (a).

Nor has the ICC, in its interpretation of section 5 (2), found any such hidden authority. It looks upon its duties as purely permissive, approving with appropriate conditions contracts, agreements, and consolidations which are negotiated by the parties under the normally applicable law governing such transactions in other fields. As the Commission has often held, it has no power to compel a carrier to undertake a section 5 (2) transaction. See, *e.g.*, *Baltimore & O. R. Co. Operation*, 261 ICC 535, 544; *Gulf M. & O. R. Co. Purchase*, 267 ICC 265, 269-70; *Chicago, Saint Paul, M. & O. R. Co. Lease*, 295 ICC 696. Further, it has been unwilling to take upon itself questions of either the interpretation or enforceability of contracts submitted with respect to a transaction. Upon occasion, parties, who have come before the Commission with executory contracts to take effect upon approval by the Commission, wish to withdraw from the proceeding. As the Commission said in refusing to dismiss the proceeding in *McGary Transportation Co. — —Purchase (Portion) — Albert J. Demelle*, 50 MCC 608, 611 (1948):

> "As to vendor's desire to withdraw from the transaction, we have repeatedly found that authority granted under former section 213 and present section 5 is permissive only, and may, or may not, be exercised by the parties, and that all matters involving the interpretation and enforcement of the terms of contracts

must be left for settlement between the parties themselves or by the courts."

See also, *Watson Bros. Transp. Co.* v. *Jaffa*, 8 Cir., 1944, 143 F. 2d 340; *O. C. Wiley & Sons* v. *United States*, W.D.Va., 1949, 85 F. Supp. 542; *Marion Trucking Co. — Purchase — Harwood Trucking Co.*, 50 MCC 613, 632 (1948); *The Service Transport Co. — Purchase (Portion) — F. E. Kerr Co.*, 59 MCC 481.[4] Even where a carrier has transferred the same rights and equipment to two different parties, the Commission has held that it must treat each application on its merits and let the two vendees litigate their conflict in the courts. *Yellow Coach Corp. — Purchase — O. B. Darnell*, 59 MCC 185, 193-94. From these cases, we believe the Commission is of the opinion that the carriers must rely upon applicable contract and corporate law to carry their section 5 (2) transaction into effect, and may not rely upon the Commission's "approval" to coerce a recalcitrant party into line. Further, we feel that it would be inconsistent with this construction of the statute to hold that, while the carriers must look to local law to enforce the transaction, unions and other noncarrier parties are bound without their consent by the Commission's permissive approval.

The appellants also argue that when the Commission conditions its approval upon the inclusion of employee protective provisions under section 5 (2) (f), these conditions bind the employees upon the carriers' decision to go through with the transaction. As already noted, however, the Commission has held that it has authority to impose conditions only on the carrier. *Chicago, Saint Paul, M. & O. R. Co. Lease*, 295 ICC 696, 701. Further, we can see little purpose

[4] "Authority granted under section 5 is permissive only, and, in the event of a dispute, the contractual rights and obligations of the parties are for determination by the courts rather than by us." 59 MCC at 484.

to the last sentence of section 5 (2) (f) if the most that the unions can bargain for is what they can obtain by right from the Commission. The sentence provides:

> "Notwithstanding any other provision of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

To permit the railway unions to enter into an agreement, yet deny them the full use of their bargaining power, i.e., the strike, would make the provision meaningless. On the other hand, by giving it full latitude, we achieve a result consistent with our basic view of section 5 (2): that to carry an approved transaction into effect, the parties must rely upon agreements voluntarily entered into and enforced under local law. In accord with this reasoning, the Commission has refused to hear employee complaints when a protective agreement has been entered into by the parties, enforceable under the applicable local law. *DeCamp Bus Lines — Purchase — Atlantic Transport Co.*, 65 MCC 452, 456.

The appellants have a secondary claim to the effect that one of the issues preventing settlement of the dispute concerns the time claims totalling more than $500,000, representing wages lost as the result of changes in working conditions instituted while the parties were in mediation, in violation of the Railway Labor Act, 45 U.S.C. §§ 152 Fifth, 156. These claims are apparently calculated by taking the difference between actual wages under the changed working conditions and wages as they would have been under the old agreement.* The appellants claim that these claims

* These sentences were withdrawn on rehearing. (Petitioners' note).

are "minor disputes" to be adjusted in accord with the Railway Labor Act, 45 U.S.C. § 153, and that under *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R. Co.*, 1957, 353 U. S. 30, injunctive relief is available to insure compliance with the procedures of the Act. It would appear from *Order of Telegraphers v. Railway Express Agency*, 1944, 321 U. S. 342, that when working conditions are changed in violation of section 6 of the Railway Labor Act, then the old agreement is considered to remain in effect and the wage claims under the old agreement are minor disputes. See also *Western Air Lines v. Flight Engineers Internat'l Ass'n*, S.D. Cal., 1961, 194 F. Supp. 908, 911.

This issue was not raised in the Complaint, however. The only references to it in the record are two or three pages of testimony describing generally the union demand during the negotiations over the proposed changes that these claims be paid. The claims themselves were not described in any detail, none of them were proved or the exact amount established. The court below did not treat them at all in its main opinion, but, in response to a request for supplemental findings of fact and conclusions of law, found that "when properly processed by the Brotherhood of Railroad Trainmen under the provisions of the Railway Labor Act, these time claims will be properly referable by the parties involved to the National Railroad Adjustment Board for decision." No relief with respect to the claims was granted.

Because of the failure of the appellants to raise the issue in its Complaint or to put the appellees on notice during the trial that this specific relief would be asked, and because of the insufficiency of the evidence on the issue, we believe the relief was properly denied. This conclusion, however, is in no way prejudicial to the right of the appellants to raise the issue again in a court of proper jurisdiction, should they so desire.

The judgment of the district court is due for affirmance.

Nonetheless a caveat seems to be called for by the peculiar facts of this case. Since the bascule bridge has been cut, some changes must go into effect. The question is not, therefore, to change or not to change, but what change. Under these circumstances the carriers might be in the position of having either to accede to union demands involving changes which the Commission would find contrary to the public interest, or helplessly to sit out a crippling strike. Since the Commission can obtain equitable relief to enforce the transaction as approved, and accepted by the carriers, or even prosecute the violation, the carriers could be caught in an insoluble dilemma — although it might be argued that it was one of their own creation. Under certain circumstances, when carriers have been faced with contract demands which would be contrary to the public interest in the effectuation of a section 5 (2) transaction, the courts have held that the carrier may be relieved of these demands by the Commission. In *Schwabacher* v. *United States*, 1948, 334 U. S. 182, in a section 5 (2) merger, the Commission had referred a dissenting group of preferred stockholders to the state courts for the adjudication of their liquidation rights on merger. This group maintained that, under state law, they were entitled to all their accumulated preferred dividends in addition to the equitable redemption value of their stock. The Commission held that the amount offered these stockholders in the plan of merger was "just and reasonable," but since the amount involved would have little effect upon the resulting financial condition of the merged carrier, the stockholders could pursue their contractual rights in the state court. The Supreme Court remanded the case to the Commission, holding that where the carriers had made a "just and reasonable" offer to the dissenting stockholders, the carriers had the right to be relieved of any additional contractual liability under state law, obligations

which would presumably be contrary to the public interest. The Court relied upon the Commission's plenary authority under section 5 (11) and its authority to control the carrier's financial structure under section 20a.

While *Schwabacher* differs considerably from the present situation, both because of the inability of a minority group of preferred stockholders to oppose a merger and because of the unusual control of the Commission over a carrier's financial structure, it may have some bearing on this case. It may indicate that after due notice and hearing, the Commission would have jurisdiction to determine whether the union demands are contrary to the public interest in the effectuation of the section 5 (2) transaction. There is no such finding by the Commission in this record; nor can we assume there will be one. Unlike the question of buying out dissenting stockholders where there is only one "just and reasonable" price representing the economic valuation of their stock, there may be many "fair and equitable" arrangements for the appellee unions. There may be many possible combinations of new working conditions that would conform to the general objectives of the carriers in this transaction. The unions may hold out for any possible "fair and equitable" arrangement. If then the differences between the unions and the carriers prove irreconcilable, and the question is suitably presented to the Commission, it may determine its jurisdiction vel non to find whether certain of the union demands are contrary to the public interest in the effectuation of the transaction. *Ct. Gulf M. & O. R. Co. — Abandonment*, 282 ICC 311, 332-35. The carriers may have grounds for relief to permit such jurisdiction to be determined and exercised and thereafter to prevent the enforcement of particular demands found to be contrary to the public interest. This matter, both on the law and the facts, if litigable at all, is within the primary jurisdiction of

the Interstate Commerce Commission. While we suggest it as a possible avenue of procedure, if the need arises, we have no intention of instructing or affecting the Commission's decision in any way. This bridge may not be reached and should not be crossed until we come to it.

The judgment is

AFFIRMED.

CAMERON, Circuit Judge: I concur in the result.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19164

TEXAS AND NEW ORLEANS RAILROAD COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY AND
THE TEXAS MEXICAN RAILWAY COMPANY,

Appellants,

VERSUS

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,

Appellees.

Appeal from the United States District Court for the Southern District of Texas

(August 17, 1962)

ON PETITION FOR REHEARING

Before RIVES, CAMERON and GEWIN, Circuit Judges.

PER CURIAM: In our opinion we stated that, "The findings of fact of the district court and its conclusions of law are embodied in an able opinion reported at 197 F. Supp. 348 (S.D. Tex. 1961)." Perhaps we should have made express mention of the supplemental findings of fact, which we did not overlook, viz:

> "On motion of plaintiffs I make the following findings of fact and conclusions of law, supplementing those contained in my Memorandum Opinion of July 21, 1961.

"FINDINGS OF FACT

"(1) In addition to the contracts referred to in the Memorandum Opinion of July 21, 1961, in this case, there was also an amended Corpus Christi Terminal Association Agreement, a copy of which was attached to the application filed by the three plaintiffs and Nueces County Navigation District with the Interstate Commerce Commission.

"(2) Beginning at 12:01 A.M., November 18, 1960, when the track leading across the bascule bridge into Corpus Christi was cut by the City of Corpus Christi, the plaintiffs started railroad operations in accordance with the four contracts, copies of which were attached to the application with the Interstate Commerce Commission and in accordance with the authority granted by said Commission in its order of November 16, 1960. Operations in such manner have continued to date.

"(3) The strike which the Brotherhood of Railroad Trainmen called against the three plaintiffs to start on Monday, July 10, 1961, was for the purpose of compelling said plaintiffs to make agreements providing for operations different from those authorized by the said Commission in its Order of November 16, 1960, and particularly in the following respects:

"(a) To require Texas and New Orleans Railroad Company and The Texas Mexican Railway Company to conduct separate operations, including separate Corpus Christi Terminal Association (C.C.T.A.) operations, in the Corpus Christi Terminal instead of joint operations.

"(b) To require Texas and New Orleans Railroad Company, as distinguished from C.C.T.A. to switch its former yards and industries in the Hughes Street-Tancahua Industrial Area. In order to reach said tracks, yards and industries as an individual railroad it would be necessary for Texas and New Orleans Railroad Company to operate over trackage owned by Missouri Pacific Railroad Company. Texas and

New Orleans Railroad Company is permitted to use said trackage for reaching the area in question when operating the C.C.T.A., but is not permitted to use Missouri Pacific track for the purpose of reaching the area in question as an individual railroad.

"(c) To require payment by the three plaintiffs to their respective employees of various time claims which have been filed by said employees represented by the Brotherhood of Railroad Trainmen against the three plaintiffs because of the changes in operations which occurred on, and have continued since, November 18, 1960, at Corpus Christi, Texas. At the time of the trial said time claims against the three plaintiffs were in excess of $500,000.00. When properly processed by the Brotherhood of Railroad Trainmen under the provisions of the Railway Labor Act, these time claims will be properly referrable by the parties involved to the National Railroad Adjustment Board for decision.

"In addition, defendants' counsel has requested the following findings of fact, which I make:

"Mediation Cases Nos. A-6265, 6266 and 6267 referred to in the stipulation which was made a part of the record in this case, were pending at the time plaintiffs filed the application with the Interstate Commerce Commission in October 1960, for approval of the changes in operation at Corpus Christi, Texas. Said cases were still pending at the time the Commission issued its Order on November 16, 1960, in response to said application and when the plaintiffs changed their methods and manner of operation on November 18, 1960."

The time claims referred to in paragraph (c) of the supplemental findings are the ones to which we had inaccurately referred in our opinion, as follows: "The appellants have a secondary claim to the effect that one of the issues preventing settlement of the dispute concerns the time claims total-

ling more than $500,000, represently wages lost as the result of changes in working conditions instituted while the parties were in mediation, in violation of the Railway Labor Act, 45 U.S.C. §§ 152 Fifth, 156. These claims are apparently calculated by taking the difference between actual wages under the changed working conditions and wages as they would have been under the old agreement." The two sentences of our opinion just quoted are withdrawn.

In our opinion we said: "Prior to November 1960 the only rail access to Corpus Christi from the north was by the bascule bridge built in 1926 for the then current demands. Since that time the population of the area has increased some eight times and the bridge became a bottleneck to rail, auto, and marine traffic." The word "rail" is stricken from the last sentence just quoted.

In our opinion we said: "This suit presents a three-way conflict between major pieces of federal legislation; surprisingly, it appears to be a case of first impression, although all three statutes have been on the books for some 30 years or more." The figure "30" and the final words "or more" are stricken.

The foregoing changes are made in order to avoid any inaccuracy. None of these changes permits a change in the result.

Appellees, on their part, urge that " . . . this Court's mandate should dissolve the temporary restraining order pending the appeal previously issued by the District Court." By its terms, the restraining order or injunction pending appeal issued by the district court was to continue in force "during the pendency of the appeal of this case and until a final order has been entered herein on appeal." We agree with the construction implicit in appellees' request just quoted, that is that when this Court's mandate issues, the

appeal will no longer be pending and a final order on appeal will have been entered. Hence, by its terms, the restraining order or injunction pending appeal will terminate upon the issuance of this Court's mandate. It is nonetheless true that the mandate may be stayed under the terms of Fifth Circuit Court Rule 32, or to enable the appellants to obtain a writ of certiorari from the Supreme Court. See 28 U.S.C.A. §2101 (f).

The petition for rehearing is

DENIED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1961

No. 19164

D. C. DOCKET NO. 13,736 CIVIL

TEXAS AND NEW ORLEANS RAILROAD COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY AND
THE TEXAS MEXICAN RAILWAY COMPANY,
Appellants,

VERSUS

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Texas

Before RIVES, CAMERON and GEWIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Texas and New Orleans Railroad Company, Missouri Pacific Railroad Company and The Texas Mexican Railway Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Cameron, Circuit Judge, Concurs in the Result."

Issued: July 6, 1962

ORDER DENYING REHEARING

Extract from the Minutes of August 17, 1962

TEXAS AND NEW ORLEANS RAILROAD COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY AND
THE TEXAS MEXICAN RAILWAY COMPANY,

No. 19164

VERSUS

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

APPENDIX B

Opinion of the District Court of the Southern District of Texas, Houston Division

JULY 21, 1961

BEFORE INGRAHAM, DISTRICT JUDGE

Plaintiffs, Texas and New Orleans Railroad Company (hereinafter "T&NO", Missouri Pacific Railroad Company (hereinafter ("MoPAC"), and The Texas Mexican Railway Company (hereinafter ("TEX-MEX"), seek to enjoin a strike called by the Brotherhood of Railroad Trainmen (hereinafter ("BofRT") a labor organization representing some of plaintiffs' employees. A brief statement of pertinent facts follows to lead context to the threatened strike. These facts were gleaned from the pleadings and hearing of July 12-13, 1961.

When the bascule bridge was removed from the entrance to the Port of Corpus Christi, Texas, it became necessary to reroute and rearrange railroad service to the city and Port of Corpus Christi. Anticipating this necessity, the three railroads made these contracts:

> (1) Primary Agreement between City of Corpus Christi, County of Nueces, Texas, Nueces County Navigation District No. 1, MoPAC, TEX-MEX, and T&NO It set forth rail service rearrangements (track abandonment, new track construction, joint yard, track rights) and methods of operation. This agreement contemplated other contracts and specified that as each was finalized a copy be filed with the Interstate Commerce Commission (hereinafter "Commission").

(2) Joint Yard Agreement between T&NO and TEX-MEX. It called for joint yard and rendition of joint switching service by joint TEX-MEX and T&NO crews. Operating costs of crews were to be prorated between the two railroads on agreed formula.

(3) Corpus Christi Joint Track Agreement. Contract between railroads and Navigation District granted trackage rights and allocated expenses.

After Primary Agreement was placed in final form and others in tentative form, application was filed with Commission under sections of the Interstate Commerce Act (hereinafter "Act"), especially 49 U.S.C.A. Sec. 5(2), for approval of the contracts and authority to effectuate them. The Railway Labor Executives' Association, which includes BofRT, filed a protest with Commission, claiming plaintiffs' applications would affect adversely plaintiffs' employees. On November 16, 1960, Commission approved all transactions involved in the applications. Commission referred specifically to each of the agreements described above. Pursuant to Commission's order, the Joint Yard Agreement between T&NO and TEX-MEX (finalized and executed on November 17, 1960) was forwarded to Commission for filing on November 25, 1960. By letter of December 8, 1960, Commission acknowledged receipt and filing of Joint Yard Agreement.

The Commission's report of November 16 (sheet 12) provided:

"No facts have been disclosed indicating that Railroad employees will be adversely affected by any of the proposals involved herein. However, all of the authorizations herein will be made subject to the same conditions for the protection of employees adversely affected by any part of the transactions involved in these proceedings as prescribed in Oklahoma Ry. Co. Trustees Abandonment, etc. . . ."

Neither the Railway Labor Executives' Association nor BofRT sought rehearing of the November 16 decision by the full Commission or tried to have the order set aside by three-judge court. The order thereby became final.

Before filing these applications with the Commission, these railroads negotiated with their employees' union trying to make agreements consonant with new operations contemplated in the agreements finally approved by the Commission. These negotiations continued after the order of November 16 and ultimately resulted in agreements with all unions except defendant BofRT. Plaintiffs allege BofRT has insisted that they make agreements providing for operations different from the provisions in the Commission-approved contracts, especially the Primary Agreement and Joint Yard Agreement. Railroads say they are willing to make an agreement with BofRT effectuating Commission's Order. Under the Railway Labor Act it was necessary to seek mediation after above negotiations failed to produce accord. Such mediation continued until May 8 and May 31, 1961. After the expiration of the 30-days-statutory period following mediation, BofRT's General Committee served notice of a strike.[1]

The parties argue as follows. BofRT says the Norris-LaGuardia Anti-Injunction Act (29 U.S.C.A. Secs. 101-110, 113-115) bars an injunction in these circumstances. 29 U.S.C.A. Sec. 101 provides:

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[1] At hearing such testimony was given by plaintiffs' officers relative to crippling consequences of threatened strike upon Texas' economy and railroads' revenues. It was shown that average daily loss of revenues of MoPAC's Gulf District would be $14,358, TEX-MEX $9,284, and T&NO $550,000. All but 500 of T&NO's 10,708 employees would be idled by strike and all but 150 of 4528 employees in Gulf District of MoPAC. On MoPAC alone a monthly payroll of over $2,000,000 would be lost. Finally, Gulf District of MoPAC served 1,614 separate industries in 1960. Disruption of MoPAC and T&NO service would seriously inconvenience major industry on the Texas Gulf Coast.

> "No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter."

29 U.S.C.A. Sec. 107 provides the terms upon which exceptions are made to Sec. 101, supra. Plaintiffs make no attempt to comply with Sec. 107, for there is no pleading that unlawful acts have been committed or will be committed unless restrained, or that public officers charged with the duty of protecting railroad property are unwilling or unable to furnish adequate protection.

Further, BofRT claims plaintiffs failed to comply with 45 U.S.C.A. Secs. 155(1)(b) and 156 in that forbidden changes in working rules and conditions were instituted by railroads during the mediation period. By virtue of these illegal changes BofRT contends plaintiffs run afoul of yet another section of Norris-LaGuardia, i.e., 29 U.S.C.A. Sec. 108:

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

Plaintiffs acknowledge their want of compliance with the Norris-LaGuardia Act's dictates of 29 U.S.C.A. Sec. 107. They urge the court to break new ground by judicially engrafting upon Norris-LaGuardia an additional exception. Plaintiffs declare "illegal" any strike to prevent their com-

plying with contracts approved by the Interstate Commerce Commission under Section 5(2) of the Act (49 U.S.C.A. Sec. 5(2)). The court is asked to enjoin such strike despite Norris-LaGuardia's ban.

Plaintiffs observe that by Section 5(11) of the Act (49 U.S.C.A. Sec. 5(11)) the Commission's authority is "exclusive and plenary". BofRT, say plaintiffs, has no veto upon Commission action. Plaintiffs are empowered to carry out their Commission-approved contracts free of the restraints of federal laws (49 U.S.C.A. Sec. 5(11)).[2] 49 U.S.C.A. Sec. 5(11) is thought by plaintiffs to free them from the restrictions of Norris-LaGuardia in their endeavor to abide by the Commission's order of November 16, 1960. Railroads contend that Section 16(12) of the Act authorizes this court to enjoin a strike of rail employees called to prevent compliance with a Commission order.[3]

Plaintiffs cite a number of cases in which judicially-created exceptions have been carved out of the broad domain

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[2] U.S.C.A. Sec. 5(11):

"The authority conferred by this section (upon the Commission) shall be exclusive and plenary, and any carrier . . . participating in . . . any transaction, approved by the Commission . . . shall have full power . . . to carry such transaction into effect . . . and any carriers are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved . . ."

[3] 49 U.S.C.A. Sec. 16(12):

"If any carrier fails or neglects to obey any order of the commission other than for the payment of money . . . the Inter-State Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district court of the United States of competent jurisdiction for the enforcement of such order. If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process . . . to restrain such carrier . . . from further disobedience . . ."

of Norris-LaGuardia. In the main these authorities constitute reconciliations of Norris-LaGuardia with specific later labor legislation. Thus, Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co. 353 U.S. 30 (1956), finds Norris-LaGuardia no bar to injunctive relief when there exists a "minor dispute" referable to the Railroad Adjustment Board under the terms of the Railway Labor Act. The rationale of this case is that the more general provisions of Norris-LaGuardia must yield to the more specific provisions of the Railway Labor Act with reference to "minor disputes". Similarly, Railroad Trainmen v. Denver & Rio Grande Western RR Co., 185 Fed. Supp. 369 (D. Colo. 1960), aff'd .... Fed. (2d) 10th Cir. 1961), 48 L.R.R.M. 2013 (10th Cir. 1961), enjoins threatened strike by brotherhood to enforce Adjustment Board award in "minor dispute". Again, result in adjustment of Norris-LaGuardia to accommodate the Railway Labor Act. An analogous case of accommodation of Railway Labor Act with Norris-LaGuardia is Brotherhood of Railroad Trainmen v. Howard, 343, U.S. 768 (1952).

Another labor statute, Taft-Hartley Act, is reconciled with Norris-LaGuardia in Int'l Brotherhood of Teamsters v. Yellow Trans. Frgt. Lines, 282 Fed. (2d) 345 (10th Cir. 1960) This was an action by trucking company to enjoin teamsters violating no-strike clause of their collective bargaining contracts. Section 301 of Taft-Hartley Act (29 U.S.C.A. Sec. 141, et seq.) provides that suits for violation of collective bargaining agreements may be brought in federal district court. Trucking companies contended that an injunction to enforce this no-strike clause is permissible under Section 301. It was decided that the jurisdiction accorded district courts by Section 301 of Taft-Hartley prevails over Norris-LaGuardia.

I come then to the heart of plaintiffs' skillful argument. Pointing to the exceptions created in Brotherhood of Rail-

road Trainmen v. Chicago River & Indiana Railroad Co., supra (reconciling Railway Labor Act and Norris-LaGuardia) and Int'l Brotherhood of Teamsters v. Yellow Trans. Frgt. Lines, supra (reconciling Taft-Hartly Act and Norris-LaGuardia) this court is asked to emulate those decisions. I am requested by plaintiffs to "reconcile" the Interstate Commerce Act and Norris-LaGuardia. Only by enjoining defendant BofRT, any plaintiffs, can the hegemony reposed in the Commission by 49 U.S.C.A. Sec. 5(11) be preserved from encroachment by BofRT.

The issue raised then is: does the Norris-LaGuardia Act bar injunctive relief against a strike to prevent a railroad's complying with a contract approved by the Interstate Commerce Commission pursuant to 49 U.S.C.A. Sec. 5(2)? I think so.

Any exceptions to Norris-LaGuardia must be justified by the most compelling policy considerations. For cases stating the pervasive and compelling character of the Anti-Injunction Act see Afran Transport Co. v. National Maritime Union, 169 Fed. Supp. 416 (S.D.N.Y., 1958), and A. H. Bull Steamship Co. v. Seafarers' Internat'l Union, 250 Fed. (2d) 326 (2d Cir. 1957).

But, argue plaintiffs, just as exceptions have been created to enforce the Railway Labor Act and Section 301 of the Taft-Hartley Act, so ought this court decree an additional exception to enforce 49 U.S.C.A. Secs. 5(2), 5(11) and 16(12). Section 5(11) of the Act purports to give the Commission "exclusive and plenary" authority, free from various federal and state statutory restraints. I do not agree with plaintiffs' contention that 49 U.S.C.A. Sec. 5(11) removes the bar of Norris-LaGuardia. It declares "*they* are relieved from the operation . . . of all other restraints, limitations, and prohibitions of law" etc. "They" refers to the carriers under Commission mandate; the prohibition of Norris-LaGuardia rests not on the carriers but on the

court. Its restraint on this court's jurisdiction is not lifted by Section 5(11).[4] Nor does the court agree with railroads' claim that Section 16(12) of the Act compels an injunction here. Section 16(12) is inapplicable by its very words, i.e., "If any carrier fails . . . to obey any order of the commission . . . any party injured thereby . . . may apply . . . for the enforcement of such order." I submit Section 16(12) is plainly referable to a dispute between government and carrier against defaulting carrier. Here, plaintiffs do not disobey the Commission, and Section 16(12) does not provide for carriers' relief against their own employees.

Plaintiffs' cases are clearly distinguishable in my view. Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co., supra, enforced by injunction the Railway Labor Act's explicit provisions for settling "minor disputes". The threatened strike at bar is a major dispute within the usage of the Railway Labor Act (45 U.S.C.A. Sec. 151 et seq.) Also, as demonstrated supra, the statutes plaintiffs say must be reconciled with Norris-LaGuardia (e.g., 49 U.S.C.A. Secs. 5(2), 5(11) and 16(12)) not only fail to support plaintiffs' claims but are not labor legislation as is the Railway Labor Act. Int'l Brotherhood of Teamsters v. Yellow Trans. Frgt. Lines, supra, reconciles the grant of jurisdiction in Section 301 of Taft-Hartley with the restriction of jurisdiction in Norris-LaGuardia. Section 301 involves collective bargaining contracts, while 49 U.S.C.A. Secs. 5(11) and 16(12) concern Commission orders, not management-labor conflict. The point is simply that the exceptions heretofore engrafted judicially upon Norris-LaGuardia aimed at accommodation of apparently conflicting provisions in two different *labor* statutes. Plaintiffs

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[4] United States v. Railway Exp. Agency, 101 Fed. Supp. 1008 (D. Del.) (1951) merely carries out the clear mandate of 49 U.S.C.A. Sec. 5(11) to the effect that carriers' agreements approved by Commission are freed from antitrust laws.

seek to weaken Norris-LaGuardia to enforce non-labor legislation, i.e., the Interstate Commerce Act.[5]

It is clear that illegality under non-labor legislation (e.g., 49 U.S.C.A. Secs. 5(2), 5(11) and 16(12)) does not remove the bar of Norris-LaGuardia upon federal injunctive power. A case closely in point factually in Telegraphers v. Chicago & N.W.R. Co., 362 U.S. 330 (1960). Railroad and union were arguing over displacement of railroad employees by consolidation of stations in villages and hamlets whose traffic warranted closing. Just as plaintiffs have sought Commission sanction upon Corpus Christi consolidation, so did railroad seek approval of station consolidation by state regulatory groups in Telegraphers case. The Telegraphers threatened strike over consolidation just as does BofRT. The Supreme Court, in denying the carrier's request for injunction, said in 362 U.S. at 338-340:

> "The railroad has argued throughout the proceedings that the union's strike here may be enjoined, regardless of Norris-LaGuardia, because its effort to bargain about the consolidation and abandonment of railroad stations (compare plaintiffs' argument at bar about Corpus Christi yard consolidation) is unlawful. It is true that in a series of cases where collective bargaining agents stepped outside their legal duties . . . we held that they

[5] Baltimore & Ohio R.R. Co. v. Chicago River & Indiana R.R. Co., 170 Fed. (2d) 654 (7th Cir. 1948), comes nearest to supporting plaintiffs. One railroad sued under 49 U.S.C.A. Sec. 16(12) to enforce a Commission order against a second railroad. The injunction granted to enforce the order ran also against defendant carrier's employees. Since the dispute over the Commission order was between two railroads, it was not a "labor dispute" between employer and employers within Norris-LaGuardia. The situation at bar differs in three respects: (1) our dispute is railroads v. employees and union, not railroad v. railroad; (2) enforcement of Commission order is sought solely against union, not merely incidentally to primary enforcement against carrier; (3) Section 16(12) of Act clearly supports carrier v. carrier enforcement; and (4) Section 16(12) by its wording does not provide for railroads v. union suit.

could be enjoined. None of these cases, however, enjoined conduct which the Norris-LaGuardia Act withdrew from the injunctive power of the federal courts except the Chicago River case which held that a strike could be enjoined to prevent a plain violation of a basic command of the Railway Labor Act. . . . The Court there regarded as inapposite those cases in which it was held that the Norris-LaGuardia Act's ban on federal injunction is not lifted because the conduct of the union is unlawful under some other, nonlabor statute. *Here, far from violating the Railway Labor Act, the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes 'concerning rates of pay, rules, and working conditions.' . . . There is no express provision of law, and certainly we can infer none from the Interstate Commerce Act, making it unlawful for unions to want to discuss with railroads actions that may vitally and adversely affect the security, seniority and stability of railroad jobs.*" (Emphasis supplied.)

Lee Way Motor Freight v. Keystone Freight Lines, 126 Fed. (2d) 931 (10th Cir. 1942), rejects claims, similar to plaintiffs' as to efficacy of 49 U.S.C.A. Sec. 16(12) in a "labor dispute" between carrier and employees' union. An attempt similar to plaintiffs to evade Norris-LaGuardia by reference to the Interstate Commerce Act's plenary authority was thwarted by the Fifth Circuit in East Texas Motor Fr. L. v. International Brotherhood, etc., 163 Fed. (2d) 10, 12 (5th Cir. 1947).

In summary the case at bar represents the classic "labor dispute" clearly within the purview of Norris-LaGuardia. Plaintiffs' argument urging creation of an added exception, facile and well-presented though it be, does violence to the national policy enunciated by the Norris-LaGuardia Act. Mr. Justice Black's closing words in Telegraphers at 362 U.S. 342, are apt:

"It may be, as some people think, that Congress was unwise in curtailing the jurisdiction of federal courts in railroad disputes as it did in the Norris-LaGuardia Act. Arguments have even been presented here pointing to the financial debilitation of the respondent . . . Railroad and to the absolute necessity for the abandonment of railroad stations. *These arguments, however, are addressed to the wrong forum.* If the scope of the Norris-LaGuardia Act is to be cut down in order to prevent 'waste' by the railroads, *Congress should be the body to do so. Such action is beyond the judicial province and we decline to take it.*" (Emphasis supplied)

Plaintiffs' request for injunctive relief will be denied. The clerk will notify counsel to draft and submit appropriate order.

APPENDIX C

STATUTES INVOLVED

Interstate Commerce Act, as amended:

National Transportation Policy (54 Stat. 899, 49 U.S.C., preceding Sec (1):

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act (chapters 1, 8, 12, 13 and 19 of this title), so administered as to recognize and preserve the inherent advantages of each, to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discrimination, undue preferences or advantages or unfair or destructive competitive practices, to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions — all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States of the Postal Service, and of the national defense. All of the provisions of this act (chapters 1, 8, 12, 13 and 19 of this title), shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 5(2)(a)(ii), 54 Stat. 905, 49 U.S.C., Sec. 5(2)(b):

> "(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: Provided, that if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

Sec. 5(2)(c), 54 Stat. 906, 49 U.S.C. Sec. 5(2)(c):

"In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following consideration, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public. (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

Sec. 5(2)(f), 54 Stat. 906, 49 U.S.C. Sec. 5(2)(f):

"As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Sec. 5(11), 54 Stat. 908, 49 U.S.C., Sec. 5(11):

"The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation

participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."

Sec. 16(6), 36 Stat. 554, 49 U.S.C., Sec. 16(6):

"The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper."

Sec. 16(7), 41 Stat. 492, 49 U.S.C., Sec. 16(7):

"It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect."

Sec. 17(11), 54 Stat. 916, 49 U.S.C., Sec. 17(11):

"Representatives of employees of a carrier duly designated as such, may intervene and be heard in any proceeding arising under this chapter and chapters 8 and 12 of this title affecting such employees."

Railway Labor Act, as amended, 48 Stat. 1191, 45 U.S.C. Section 153 (i), (j), (k), and (l):

"(i) The disputes between an employee or group of employees and the carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

"(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as

to any such dispute must be made by the entire division as hereinafter provided.

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof, and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees."

Sec. 156:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without re-

quest for or proffer of the services of the Mediation Board."

Norris-LaGuardia Act:

Sec. 101, 47 Stat. 70, 29 U.S.C., Sec. 101:

"No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter."

Sec. 104, 47 Stat. 70, 29 U.S.C. Sec. 104:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined), from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in Section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title."

Sec. 108, 47 Stat. 72, 29 U.S.C., Sec. 108:

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

APPENDIX D

HISTORY OF SECTION 5(2)(f)

As stated in *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, at pages 146-47:

> "Before the Transportation Act of 1940 brought Sec. 5(2)(f) into the Interstate Commerce Act, there was no statutory provision specifically requiring the protection of employees affected by consolidations of railroad facilities. The precursor of this provision was Sec. 5(4)(b), as amended by the Emergency Railroad Transportation Act of 1933. That section authorized the Commission to approve consolidations 'upon the terms and conditions . . . found to be just and reasonable.' There was, however, a widespread awareness in the railroad industry that many of the economies to be gained from consolidations or abandonments could be realized only at the expense of displaced railroad labor."

Early in 1936, Joseph B. Eastman, Coordinator of Railroads, proposed to issue orders under the Emergency Transportation Act of 1933, compelling unification of terminals in twelve different places. That proposal created a great deal of concern on the part of railroad employees, and on March 6, 1936, President Roosevelt sent a joint letter to Mr. Pelley, representing the Association of American Railroads, and Mr. Phillips, representing the Association of Railway Labor Executives, asking that railroad management and railroad labor attempt to work out a mutually satisfactory agreement for the protection of labor affected by consolidations and coordinations. In the course of the letter, President Roosevelt said:

> "A critical situation prompts this letter. It is common knowledge that there is much waste in railroad operation caused by the great number of railroad companies,

and that much of it can be avoided either by consolidations or by greater cooperation and coordinated use of various facilities. This waste hampers railroad progress and is a burden on the rate-paying public. It ought to be eliminated for the good of all concerned . . .

"In the long run, the employees will surely gain from maximum efficiency and economy in railroad operation. With competitive conditions what they now are, and promise to become, this is the only path to the increased traffic and revenues which the railroad future will require. But sudden steps in this direction may cause temporary hardships. The employees are fairly entitled to protection against such hardship."[1]

As a result of the President's request, negotiations were undertaken which resulted in an agreement in May, 1936, known as the Washington Agreement. It was signed by all of the railway labor organizations and by representatives of railroads operating about 85% of the railroad mileage in the United States. This agreement gave employees specified protection against the adverse effects of consolidations and coordinations.[2] All of the railroads involved herein were parties to the Washington Agreement, and the agreement is still in effect.

In 1938, the President appointed a Committee of Six, consisting of three railroad and three labor representatives, to reconcile management-labor differences incident to a legislative program which ultimately resulted in the Transportation Act of 1940.[3] That Committee agreed on a proposal that the Interstate Commerce Commission (it was first

[1] Testimony of Joseph B. Eastman, Hearings of the House Committee on Interstate and Foreign Commerce, HR 2531, 76th Cong., 1st Sess. 1720-23 (hereinafter referred to as House Hearings (1939)).

[2] The agreement is published at pages 231-41, House Hearings (1939).

[3] 86 Cong. Rec. 5880.

proposed that these matters be handled by a separate Transportation Board), before approving a consolidation of rail lines, should require that fair and equitable arrangements be made for the protection of the employees who might be affected adversely thereby. This proposal was incorporated in bills presented in both the House and Senate. George M. Harrison, a labor representative on the Committee of Six, while testifying before the House Committee, said:

> "Well, you might very properly ask the question, If we have [the Washington] agreement why we want to put anything in the law? Well, the reason for it is that about 15 per cent of the mileage of the country refuses to come into the agreement. You always have the willful minority that will not go along with the general good and so you have got to make those people do what is right, assuming that what has been done is right, and so we propose that this Transportation Board be given the authority to impose and require protection for men who are adversely affected when these changes are made."[4]

Mr. Harrison went further to explain the position of labor in seeking, along with government and management, a solution to the problems of the railroads.

> "Now, in regard to financial reorganization; I think it is inevitable that people who have their money in the industry have got to make a sacrifice, because the industry just won't support the volume of debt now existing. It just cannot earn the money out of the available business and with competition as it exists today and will exist in the future.
>
> "I doubt that many of the properties would ever be able to support the present volume of debt.

---

[4] House Hearings (1939) 216-17. See also statement of Representative Lea, 86 Cong. Rec. 5864.

"Now, I do not understand that the investor is adverse to making a reasonable contribution that will come about as the result of these financial reorganizations.

"Labor has indicated its willingness to cooperate by saying that where it can be shown to be in the public interest, mergers ought to be effected and then we are making a sacrifice to the extent of a portion of our wages, because, under the collective agreement of May 1936, we only get 60 percent of compensation for men who are furloughed or deprived of employment.

"So we would be giving 40 percent of our wages."[5]

The position of the Trainmen was contrary to that of all the other Brotherhoods. Mr. McGrath, the Trainmen's General Counsel, testified strongly against the consolidation and merger proposals. In the course of his remarks, he stated:

"While the Brotherhood of Railroad Trainmen reluctantly subscribe to the so-called Washington or dismissal wage agreement, we have never felt that it does justice to the men who may be displaced by reason of railroad unifications. Even that agreement was made in the light of the fact that the law provided a means by which it has been impossible to bring about the deprivation of employment for railroad men on any drastic scale. An acceptance by railroad labor of the provisions concerning the unifications which are now proposed cannot but be construed as a tacit agreement on the part of railroad employees that mergers, consolidations, co-ordinations, and so forth, may be freely made, so long as the interests of labor are 'considered' and some sort of supposed protection given to their interests. If the bill is passed with Section 49 as it now reads, it will be interpreted as an invitation to the railroads to accelerate their consolidations plans, and by the Commission or Board to do the same with regard to the approval of such plans. If such a course is pursued we

[5] House Hearings (1939) 217-18.

cannot but look forward to a wholesale destruction of railroad jobs without adequate compensation to the employees for the loss.[6]

The testimony of Mr. McGrath contrasts sharply with that of Mr. Harrison, both before the House Committee and the Senate Committee. In the latter testimony Mr. Harrison had the following exchange with Senator Reed:

> "*Senator Reed:* Having run into your Brotherhoods at different times in my career, I think I understand their approach, which again is an approach of maintaining employment as stable as possible; but if in the working out of this problem it became necessary or desirable to have unification and if the men who were displaced by unification or consolidation were taken care of by a reasonable adjustment, such as you now have with the management, would that not largely take care of the labor situation?
>
> *Mr. Harrison:* I think in the main, Senator —
>
> *Senator Reed:* Thank you very much.
>
> *Mr. Harrison:* (continuing)—that it protects labor.
>
> *Senator Reed:* Thank you, very much. We all want to protect labor. There is no unfriendliness among us. I am one, if you please, who believes that there is no answer to this railroad problem except consolidation or, prior to consolidation, a very substantial unification of facilities, so as to reduce the operating expenses and the cost of service down to a point where the railroads can sell more service."[7]

After the Committee hearings, the recommendation of the Committee of Six was subjected to close scrutiny, rigorous debate, and traveled a rough road, particularly in the House, before present Section 5(2)(f) of the Act was adopted.

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[6] House Hearings (1939) 1292.

[7] Hearings on S. 2009 before the Senate Committee on Interstate Commerce, 76th Cong., 1st Sess. 38.

At some stage of the Congressional hearings, the Trainmen disagreed with the recommendation of the Committee of Six so far as consolidations and coordinations were concerned. Consequently, at the instigation of the Trainmen, in the House, Representative Harrington offered an amendment to the bill under discussion incident to railroad consolidations and coordinations so that the provisions pertaining to employee protection would be (the italicized language being the amendment proposed by Representative Harrington) as follows:

> "The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interest of the employees affected, *Provided, however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees.*"[8]

The proposed amendment was debated at some length and during the course of the debate it was clear that the Trainmen were the real sponsors. Proponents of the amendment quoted Daniel Willard, President of the B&O Railroad, to the effect that:

> "Eighty percent of the savings effected by consolidations would be taken out of the pockets of the railroad workers,"[9]

and they insisted that the employees were entitled to more protection than merely leaving to the discretion of the Commission imposition of conditions that were fair and equitable. Representative Harrington concluded his remarks with the following statement:

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[8] 84 Cong. Rec. 9882.

[9] 84 Cong. Rec. 9883.

> "Fellow Members, in addition to all its other inequities against the public, this legislative monstrosity will throw thousands of railroad employees out of work. Let us sidetrack the bill now until the next session. In the meantime I feel safe in assuring you that the railroad brotherhoods will wake up to the fact that they are the victims of a 'sellout.' An educational plan is under way to undeceive them as to the so-called merits of this bill. The 'Paul Reveres' are beginning to ride. The country is just getting wise."[10]

Representative Lea, joined by Representative Rayburn, spearheaded the effort to defeat the Harrington amendment. Among other things Representative Lea pointed out that twenty of the twenty-one Railroad Brotherhoods were supporting the bill, without amendment; that railroad jobs could best be preserved by eliminating surplus railroad facilities and operations; and that the amendment would prevent any consolidations or coordinations which had any adverse effect on railway labor. The amendment was adopted by the House.[11]

The following is quoted from *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, at pages 151-53:

> "With the Harrington Amendment in it, the bill went to conference. It came out with all provisions relating to consolidations under Sec. 5 eliminated. The House, however, recommitted the bill to conference with instructions to insert a modified form of the first sentence of Sec. 5(2)(f), together with a modified form of the Harrington Amendment . . . .
>
> "The second conference reported Sec. 5(2)(f) in the final form in which it was enacted into law. It retained the first sentence in its original language. In the second sentence, however, it included a substantial change in

[10] *Ibid.*

[11] 84 Cong. Rec. 9887.

the Harrington proposal. It limited it to the four years following the effective date of the Commission's order of approval. It provided also that in each case the protective period was not to exceed the length of each employee's employment by a carrier prior to the effective date of the Commission's order of approval. . . ."

Two statements made during the final debate in the House on the Transportation Act of 1940 serve to sum up the history and intent of Section 5(2)(f). The first is by Representative Lea:

"The next amendment concerning which the House instructed us was known as the Harrington amendment. There were certain things involved in the instructions as to this amendment to which I want to call your attention. The first was that the Interstate Commerce Commission should make fair and equitable provisions for employees affected adversely by reason of consolidations or unifications. We had a provision in the original bill that came to the House to that effect and the amendment that we have agreed upon embodies that same provision.

"Another provision was that where there is a substitution of transportation, for instance, by truck instead of rail, the employees of the abandoned line should have under those circumstances an order of the Commission fairly protecting their rights against unemployment. That is the only provision that is eliminated in this conference report.

"There was a further provision — the instruction as to the Harrington amendment — that the agreement should include conditions so that the transaction will not result in employees being placed in a worse condition with respect to their employment. That provision is written in the conference agreement.

"Then there was a provision confirming the right of employees to enter into agreements with railroads to take care of them in case of unemployment as a result of consolidations.

"The substitute that we bring in here provides two additional things. First, there is a limitation on the operation of the Harrington amendment for 4 years from the effective date of the order of the Commission approving the consolidation: In other words, the employees have the protection against unemployment for 4 years, but the Commission is not required to give them benefits for any longer period. If the employees themselves make an agreement with the railroad company for a better or a longer period, that is a matter between the railroad men and the railroads, but this 4-year limitation is established by the pending conference agreement.

"There is another limitation on the protective benefits afforded by the amendment. The benefit period shall not be required for a longer period than the prior employment of the employee before the consolidation occurred. In other words, under the original Harrington amendment, if a man was employed for 6 months, he would indefinitely be subject to the benefits of the amendment from the railroad company. We have changed that so the railroad company will not be required to maintain him in no worse condition as to his employment for any longer period than he worked before the consolidation occurred.

"We believe that is a very fair and a very liberal provision for labor. We believe that railway labor substantially agrees in that viewpoint. We take nothing from labor by this agreement. We simply write specific provisions that shall be in the order of approval of the Commission, but otherwise we do not tie its hands."[12]

The second statement was made by Representative Wolverton:

"[I]t was recognized that the real intent of the sponsors [of the original proposals] was to save the railroad employees from being suddenly thrust out of

[12] 86 Cong. Rec. 10178.

employment as the result of any consolidation or merger entered into. . . . In fact the provision contained in the original bill had the approval of 20 out of the 21 railroad brotherhoods. And, it is significant in this connection that the one brotherhood which did not agree to our language had never asked for anything other than that the entire consolidation provision be left out of the bill and the matter be left at this time as a matter for collective bargaining.

"The conferees have struggled long and hard to agree upon language that would be mutually satisfactory to all the Senate conferees, the brotherhoods, and the railroads. We believe the language now proposed as a compromise is a fair and just solution. We also understand that it is acceptable to all who are to be effected by the provision. I sincerely hope that it will have the approval of the House as I do not believe anything further can be done if this fails to be acceptable. If this should fail then I am fearful that it would not be possible to obtain any legislation on the subject. I do not believe that any one who is truly interested in the welfare of the employees, or in helping the plight of the distressed railroad industry would want such a result. Nor should anyone overlook the fact that the adoption of this amendment as agreed to by the conferees gives railroad workers protection against sudden dismissal and financial assistance that is not enjoyed by workers in any other industry. And, this is true without any exception or qualification whatsoever."[13]

[13] 86 Cong. Rec. 10189.

APPENDIX E

HISTORY OF SECTION 5(11)

Section 5(11) of the Interstate Commerce Act was enacted in its present form as part of the Transportation Act of 1940, 54 Stat. 899, 908. The earliest predecessor of the present Section 5(11) was enacted as part of the Transportation Act of 1920, 41 Stat. 456, 482, and was codified as Section 5(8) of the Interstate Commerce Act. The Transportation Act of 1920 preceded the original enactment of the Railway Labor Act in 1926, and the Norris-LaGuardia Act in 1932. Hence in 1920 there was no occasion to decide which act might take precedence over the other.

Section 5(8) of the 1920 Act was reenacted in substantially the same form as part of Title II, Section 202, of the Emergency Railroad Transportation Act, 1933, 48 Stat. 211, 219. Codified as Section 5(15) of the Interstate Commerce Act, this immediate precedessor to the present Section 5(11) provided:

> "(15) . The carriers and any corporation affected by any order made under the foregoing provisions of this section shall be, and they are hereby, relieved from the operation of the antitrust laws as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and of all other restraints or prohibitions by or imposed under authority of law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by such order."

To understand the significance of this section, reference should be made to the structure and general purpose of the entire Emergency Railroad Transportation Act, 1933. This Act consisted of two separate Titles — Title II consisting wholly of amendments to the existing Interstate Commerce Act (48 Stat. 217-221). Title I, in distinction,

created the position of Federal Coordinator of Transportation and vested him with various temporary emergency powers intended to promote railroad economies, including those resulting primarily from coordinations falling short of Section 5 unifications (48 Stat. 211-217).

Section 10 of Title I had the same general purpose as Section 202 of Title II, but contained important additional provisions as is readily apparent:

> "Sec. 10(a) The carriers or subsidiaries subject to the Interstate Commerce Act, as amended, affected by any order of the Coordinator or Commission made pursuant *to this title*, shall, so long as such order is in effect, be, and they are hereby, relieved from the operation of the antitrust laws, as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, other than such as are for the protection of the public health or safety, in so far as may be necessary to enable them to do anything authorized or required by such order made pursuant to this title: *Provided, however, That nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through the contracts entered into in accordance with the provisions of said Act.*
>
> "(b) The Coordinator shall issue no order which shall have the effect of relieving any carrier or subsidiary from the operation of the law of any State or of any order of any State commission until he has advised the State commission of said State, or the Governor of said State if there be no such commission, that such order is in contemplation, and shall afford the State commission or Governor so notified reasonable opportunity to present views and information bearing upon such contemplated order, nor unless such

> order is necessary, in his opinion, to prevent or remove an obstruction to or a burden upon interstate commerce." (Emphasis supplied.)

Thus, the broad relief against the operation of Federal and State laws granted in Title II under Section 5(15) was, as to Title I orders, rendered inapplicable to the Railway Labor Act and to duties and obligations imposed by contracts entered into under the provisions of that Act.

The legislative history of Title I, Section 10 indicates an obvious Congressional awareness of the effect of this distinction between these provisions of Titles I and II, both forming part of the same 1933 Act.

The 1933 Act was before both Houses of Congress as S.1580. As originally reported to the Senate by the Committee on Interstate Commerce, S.1580 included Title I, Section 10, in essentially the form of final enactment. The hearings held before the Senate Committee prior to the issuance of its report include pointed references to the provisions of Section 10. Commissioner Eastman in his testimony referred specifically to Section 10 and to the proviso regarding the Railway Labor Act.[1] Mr. Donald Richberg, counsel for Railway Labor Executives' Association, was even more detailed in his reference to the Railway Labor Act and collective bargaining agreements. He proposed an amendment which would have added the following to Title I, Section 7:

> "No bulletin, notice, order or other method of changing contractual requirements or the established interpretation or application of an existing contract between a carrier and its employees or fixing wages and working conditions without an agreement between a carrier and its employees, shall be effective unless made after compliance with the requirements of the Railway

[1] Hearings on S.1580 before the Senate Committee on Interstate Commerce, 73rd Cong., 1st Sess. 31.

Labor Act and particularly as set forth in Sections 2 and 6 thereof."[2]

Thereafter, there occurred the following colloquy, relating to the effect of this proposal:

> "*Senator Couzens.* I mean if the Coordinator wants to do anything that is any way touching the contractual relations between the railroads and the employees, it could not be done until the employees and the railroads agreed?
>
> *Mr. Richberg.* Or tried to reach an agreement. That is correct.
>
> *Senator Couzens.* Yes.
>
> *Mr. Richberg.* That is, as a matter of fact, supposed to be retained in the present draft of the bill, which provides that —
>
> 'Nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act.'
>
> We have seen so much of the evasion of that act. We think it ought to be written out a little more clearly."[3]

It is most significant that despite his obvious familiarity with S.1580, Mr. Richberg did not question the failure of the proposed Section 5(15) to exclude from the scope of its operation the Railway Labor Act and contracts entered into thereunder. Nor was any reference to this significant difference challenged elsewhere in the hearings by spokesmen for railroad labor.

The emergency powers conferred on the Coordinator under Title I were a subject of substantial debate when

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[2] Id. at 101.

[3] *Ibid.*

S.1580 was being considered. This debate related primarily to state laws and demonstrated clearly why no concern was expressed over the difference between Title I, Section 10 and Title II, Section 202, so far as the Railway Labor Act is concerned.

During the Senate debate on May 27, 1933, continuing concern was expressed about the power of a single Co-ordinator to relieve against the operation of state laws. The power of one man to do so, as provided in Title I, was compared unfavorably with the power of the full Commission to do so as provided in Title II.[4] In the course of these discussions on May 27, at the request of Senator Norris, Title I, Section 17, was amended by the addition of the following clause:

> ". . . but notwithstanding the provisions of section 10 no such order shall operate to relieve any carrier from the effect of any State law or of any order of a State commission enacted or made after this title ceases to have effect."[5]

Senator Connally also succeeded in having Title I amended by the addition of the following provisions, forming Title I, Section 11, of the Act as finally passed:

> "Sec. 11. Nothing in this title shall be construed to relieve any carrier from any contractual obligation which it may have assumed, prior to the enactment of this act, with regard to the location or maintenance of offices, shops, or roundhouses at any point."[6]

Concern over the impact of Federal orders on state laws and contracts was expressed only in connection with the emergency powers of the Coordinator under Title I of the

[4] 77 Cong. Rec. 4433-39.
[5] 77 Cong. Rec. 4438.
[6] 77 Cong. Rec. 4439.

1933 Act. No one suggested that similar limitations should be imposed on Commission orders entered under Section 5 of the Act. Commission regulation was not feared; one man rule was.

The Senate's awareness of the differences in the provisions in Title I and Title II appears in the following colloquy between Senator Vandenberg and Senator Dill, the bill's sponsor, with reference to Title I, Section 10:

> "*Mr. Vandenberg.* Does the proposal undertake at any point to permit the Coordinator to suspend the operation of state laws?
>
> *Mr. Dill.* Yes; the bill contains in Section 10, language that is at present in the Interstate Commerce Act. The law of 1920 authorized the Interstate Commerce Commission to suspend Federal and State laws, if it was found in the public interest to do so, in the consolidations that were authorized. The pending bill carries practically the same language, except that it has the reservation of protection to the public health and the public safety, and of the Railway Labor Act, which the interstate commerce law today *does not have*. They cannot be suspended under the provisions of this bill."[7]

Before passing the Transportation Act of 1940, which included Section 5(11) in its present form, Congress had before it a proposal to limit Commission orders under Section 5 so that they would not suspend the requirements of the Railway Labor Act and contracts entered into under the same. Title II, Section 209 of H.R. 2531 (76th Cong., 1st Sess.) provided:

> "The carriers affected by an order of the Commission made pursuant to this Act shall, so long as such order is in effect, be, and they are hereby, relieved from the operation of the anti-trust laws, as designated in

[7] 77 Cong. Rec. 4254. (Emphasis supplied.)

section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and of all other restraints or prohibitions of law, State of Federal, other than such as are for the protection of the public health or safety, insofar as may be necessary to enable them to do anything authorized or required by such order made pursuant to this Act. *Nothing herein shall be construed to repeal, amend, suspend or modify any of the requirements of the Railway Labor Act, as amended, or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act:* The Commission shall issue no order which shall have the effect of relieving any carrier from the operation of the law of any State or the order of any State authority, unless it shall have given the Governor of such State prior notice of the proceeding and an opportunity to be heard." (Emphasis supplied.)

In enacting Section 5(11) Congress chose to ignore the restrictions which had been proposed in H.R. 2531. In fact Congress chose to broaden the language of the previous acts, as appears from the final form of Section 5(11), which includes the key introductory phrase, "The authority conferred by this section shall be exclusive and plenary . . .," and omits any mention of previously proposed restraints.

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Supreme Court of the United States

October Term 1962

NO. 589

TEXAS AND NEW ORLEANS RAILROAD COMPANY, ET AL., *Petitioners*

v.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL., *Respondents*

BRIEF FOR RESPONDENTS IN REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term 1962

NO. 589

TEXAS AND NEW ORLEANS RAILROAD COMPANY, ET AL., *Petitioners*

v.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL., *Respondents*

BRIEF FOR RESPONDENTS IN REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Justice And The Associate Justices Of The Supreme Court Of The United States:

Respondents Brotherhood of Railroad Trainman R: D. Jones, and others, respectfully present this brief in opposition to the Petition for Writ of Certiorari.

OPINIONS BELOW

The citations of the opinions below listed in Petitioners' Brief and set out in its Appendix A-B is correct.

JURISDICTION

Jurisdiction is claimed by Petitioners on 28 *U.S.C.* Sec. 1254.

However, Respondents feel that a Writ of Certiorari should not issue in this case, because the decision of the Honorable Court of Appeals is not in conflict with a decision of any other Court of Appeals, or of any decision of this Honorable Court. There has not been decided any important question of federal law which should be settled by this Court, but on the contrary the decision is in full accord with prior decisions of this Honorable Court and was decided correctly. All judicial proceedings in this case have followed the usual and accepted course of sound procedure and interpretation.

QUESTIONS PRESENTED

The statement of Petitioners as to Questions presented do not follow the assignments of error claimed in their Petition for Rehearing before United States Court of Appeals for the Fifth Circuit but are entirely different in scope. Respondents feel that a more accurate statement of the "Questions Presented" would be as follows:

(1) Whether the District Court properly denied an injunction sought to enjoin a strike over labor dispute permitted under the Railway Labor Act.

(2) Whether the Railroads can evade or avoid the mandatory requirements of the Railway Labor Act providing for mediation on any changes in rates of pay, rules or working conditions by securing a "permissible" order from the Interstate Commerce Commission changing unilaterally such rules and working conditions.

(3) Can the mandatory requirements of the Railway Labor Act providing for collective bargaining, negotiation and mediation by both parties when changes in rules, working conditions and established practices are sought, be bypassed or eliminated and unilateral labor contracts containing such changes forced upon the employees of a railroad through a "permissible" approval of contracts by the Interstate Commerce Commission.

STATUTES INVOLVED

Additional statutes involved not set out in the Petitioners Application Appendix C, pgs. 41a-48a are as follows:

(1) Railway Labor Act, as amended 48 Stat. 1186, 45 U.S.C. Sec. 151(a); 63 Stat. 107; 45 U.S.C. 155 (First).

(2) Norris-La Guardia Oct. 47 Stat. 70 et seq.; 29 U.S.C. 102, 107, 113.

The complete text of the above cited Statutes appears in Appendix C, infra, pg. 53, Supreme Court Rule 23 (1)(d).

STATEMENT

Respondents cannot undertake the burden of writing a separate statement to correct the slanted and argumentative "statement" set out by Petitioners in their application, without unduly lengthening this brief. The statement of facts set out by both the Honorable Trial Court and the Court of Appeals in their able opinions are concise, factual, accurate and undistorted. We respectfully refer Your Honors to those opinions (Pet. Appendix A-B, pgs. 1a-5a and 29a-31a).

In addition to the statement referred to, it also appears that negotiations on these changes had been in progress for many months before the serving of "section 6" notices

by the Carriers (Ex. 15-16) SR 23-36 and BofRT (Ex. 17) SR 37 and knowledge of the impending changes had been had by the Petitioners for many years. Yet no proposals for agreements in variance in the slightest detail from the provisions of the Primary Agreement and supplemental agreements were brooked by the Railroads (Ex. 1). The railroads will consent to only an agreement that does not change their pre-conceived, pre-planned unilateral program and demands.

The Interstate Commerce Commission Order of November 16, 1960, under its Finance Docket No. 21325 (R. 27-43) provided in paragraph 3 (headnote) as follows:

> "Pursuant to agreements and modification thereof. *Continued operations by Texas And New Orleans Railroad Company of port facilities* at Corpus Christi, * * *" (Emphasis supplied)

and in its conclusion as follows:

> "The facts involved in the consolidated applications here presented are all interrelated and present only two primary issues to be considered: (1) the proposed abandonment by T&NO of a portion of its present line by which it now serves Corpus Christi port area, and (2) the construction and other proposals necessary to obtain a substitute route *for continued operation by the T&NO in serving the same port area.*" (Emphasis supplied).

The "section 6" notices under the Railway Labor Act were served May 4, May 5, and May 9, 1960. The "primary agreement", was entered into on May 27, 1960, and filed with the application of three railroads on October 17, 1960. The I.C.C. ruling was dated November 16, 1960. The Tex-Mex - T&NO Joint Yard Agreement was executed on November 17, 1960, and mailed for filing with

the I.C.C. November 25, 1960. The bascule bridge was cut at midnight November 18, 1960, and the complained of changes were instituted. All during this time the matters of such changes were still pending before the Mediation Board. These mediatory efforts continued until May 8 and May 31, 1961. Notice of the proposed strike was served on the carriers on July 6, 1961 "for failure to abide by the provisions of the Railway Labor Act as amended in handling of mediation Cases A-6265, A-6266, A-6267." (Ex. 18-19-20 SR 38-40).

REASONS WHY WRIT SHOULD BE DENIED

From the facts developed in the case it will be seen that during May 1960 the three Railroads and BofRT served notices on each other under Section 6 of the Railway Labor Act, 45 *U.S.C.A.*, Sections 155-156 (ordinarily called "section 6 notices"), because of certain desired *changes in working conditions* in connection with the reloation of certain tracks due to the removal of the bascule bridge in Corpus Christi, Texas, and the establishment of a new train yard and new interchange tracks involving all three carriers and the Corpus Christi Terminal Association (CCTA).

Under the Railway Labor Act it was necessary to seek mediation after conferences failed to bring about an agreement between the parties. Such mediation was invoked and continued until May 8 and May 31, 1961.

Both Sections 155(1)(a) and 156, 45 *U.S.C.* (App. "C" p. 53) provide that once mediation has begun, "No change shall be made in the rates of pay, *rules*, or *working conditions* or *established practices* in effect prior to the time the dispute arose" during the period of mediation and for thirty days after it has ended.

Yet, in spite of this, the Railroads in concert did make and institute such changes in rules, working conditions and established practices.

This was done by means of a claimed right based upon the securing of an approval of a pre-agreement and some sub-agreements from the I.C.C. Each of the applications upon which permissive orders were issued by the I.C.C. were made after mediation had begun and before any final agreement had been reached between the railroads.

Mediation having ended and a strike called, the complaint seeking an injunction against the strike was filed and was refused. This brings us before this Court to determine the correctness of the Trial Court's ruling, and the Court of Appeals affirmance.

The question of injunctions in labor disputes is governed by the Norris-LaGuardia Act, Title 29, Sections 101-113, *U.S.C.* 47 Stat. 70 et seq. (App. "C", p. 53).

Title 45, Section 101 *U.S.C.* (App. "C", p. 53) deprives the Federal Courts of jurisdiction to issue injunctions and restraining orders in labor disputes.

Title 29, Section 107, *U.S.C.*, (App. "C", p. 53) provides the terms upon which an exception to Sec. 101 can be made. There was no pleading in this cause that unlawful acts had been committed or would be committed unless restrained, or that such had been committed and would be continued unless restrained or that the public officers charged with the duty to protect the Plaintiff's property were unwilling or unable to furnish adequate protection. Such pleadings were vital and of course the proof was most essential and there was no such proof made in this case to such effect.

Title 45, Section 108 *U.S.C.* (App. "C", p. 53 denies injunctive relief to a complainant who fails to comply

with the provisions of the Railway Labor Act, or who has failed to make every reasonable effort to settle the labor dispute by negotiation or mediation efforts.

It is apparent from the evidence in this case that the Petitioners have wholly failed to comply with the obligations imposed by the Railway Labor Act in the labor dispute in question to settle the controversy between the parties by making every reasonable effort either by negotiations or with the aid of available governmental machinery of mediation.

It is apparent from the record in this case that a plan had been instituted in concert between the three railroads involved here to effect a purpose of avoiding executing agreements with Respondents' General Committees and the employees represented by them, because at no time during any of the negotiations have the Petitioners offered to agree to anything other than their preconceived, pre-planned unilateral plans and demands.

Therefore, Petitioners having been in violation of the terms of the Railway Labor Act by instituting changes while the controversy was in mediation and by having failed to comply with the terms of the Norris-LaGuardia Act and being under the restraint of the Norris-LaGuardia Act no injunctions or restraining orders should be or can be made.

In the case of *Order of Railroad Telegraphers v. Chicago & Northwestern R. Co.*, 80 S. Ct. 761 (1960), it appears that an action by the Railroad against the union to enjoin it from striking in aid of demand for contractual right to bargain about steps to be taken to abandon stations which would abolish jobs resulted in the declining by the Court to grant a permanent injunction. This Honorable Court in affirming the Trial Court's action held, even though

the Railroads had filed applications with public utility commissions in four of the nine states in which it operated seeking permission to institute plans for the abolishment of various stations, that Section 4 of the Norris-LaGuardia Act specifically withdrew jurisdiction from a District Court to prohibit a strike. This Court stated (in answer to the arguments raised there and also here):

> "Unless the literal language of this definition is to be ignored, it squarely covers this controversy. *Congress made the definition broad because it wanted it to be broad. There are few pieces of legislation where the congressional hearings, committee reports, and the language in the legislation itself more clearly point to the necessity for giving an Act a construction that will protect the congressional policy the Act adopted. Section 2 of this Act specifies the public policy to be taken into consideration in interpreting the Act's language and in determining the jurisdiction and authority of federal courts; it is one of freedom of association, organization, representation and negotiation on the part of workers. The hearings and committee reports reveal that Congress attempted to write its bill in unmistakable language because it believed previous measures looking toward the same policy aganist nonjudicial intervention in labor disputes had been given unduly limited constructions by the Courts.* (Emphasis supplied).
>
> "Plainly the controversy here relates to an effort on the part of the union to change the 'terms' of an existing collective bargaining agreement. The change desire just as plainly referred to 'conditions of employment' of the railroad's employees who are represented by the union. The employment of many of these station agents inescapably hangs on the number of railroad stations that will be either completely abandoned or consolidated with other stations. And in the collective bargaining world today, there is

nothing strange about agreements that affect the permanency of employment. The District Court's finding that '(c)ollective bargaining as to the length or term of employment is commonplace', is not challenged. * * *

"* * * In an effort to prevent a disruption and stoppage of interstate commerce, *the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow*, the scope of subjects about which workers and railroads may or must negotiate and bargain collectively. Furthermore, the whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees themselves. It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of employees as well as the interests of the railroad and the public at large. (Emphasis supplied).

"(4, 5) The railroad has argued throughout the proceedings that the union's strike here may be enjoined, regardless of Norris-LaGuardia, because its effort to bargain about consolidation and abandonment of railroad stations is unlawful. It is true that in a series of cases where collective bargaining agents stepped outside their legal duties and violated the Act which called them into being, we held that they could be enjoined. None of these cases, however, enjoined conduct which the Norris-LaGuardia Act withdrew from the injunctive power of the federal courts except the Chicago River case which held that a strike could be enjoined to prevent a plain violation of a basic command of the Railway Labor Act 'adopted as a part of a pattern of labor legislation.' 353 U.S. 30, 42, 77 S. Ct. 635, 641. The Court there regarded as inapposite those cases in which *it was held that the Norris-LaGuardia Act's ban on federal injunctions is not lifted because the conduct of the union is unlawful under some other, nonlabor statute.* Here, far from violating the Railway Labor Act,

the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes 'concerning rates of pay, rules, and working conditions'. 45 U.S.C. Sec. 152, First, 45 U.S.C.A. Sec. 152, subd. 1. Moreover, neither the respondent nor anyone else points to any other specific legal command that the union violated here by attempting to bring about a change in its collective bargaining agreement. It would stretch credulity too far to say that the Railway Labor Act, designed to protect railroad workers, was somehow violated by the union acting precisely in accordance with that Act's purpose to obtain stability and permanence in employment for workers. *There is no express provision of law, and certainly we can infer none from the Interstate Commerce Act, making it unlawful for unions to want to discuss with railroads actions that may vitally and adversely affect the security, seniority and stability of railroad jobs.* And for a number of reasons the state public utility proceedings, invoked by the railroad to obtain approval of consolidation or abandonment of stations, could not stamp illegality on the union's effort to negotiate this whole question with the railroad. The union merely asked for a contractual right to bargain with the railroad about any voluntary steps it might take to abandon stations and thus abolish jobs. Nothing the union requested would require the railroad to violate any valid order of any public agency. There is no testimony and there are no findings that this union has set itself up in defiance of any state mandatory order. In fact, there was no state order of any kind at the time the union first asked to negotiate about the proposed contractual change. Even if a Norris-LaGuardia 'labor dispute' could not arise out of an unlawful bargaining demand, but see Afran Transport Co. v. National Maritime Union, D.C., 169 F. Supp. 416, 1959 A.M.C. 326, the union's

proposal here was not unlawful. * * *" (Emphasis supplied).

" * * * (7) In concluding that the injunction ordered by the Court of Appeals is forbidden by the Norris-LaGuardia Act, we have taken due account of the railroad's argument that the operation of unnecessary stations, services and lines is wasteful and thus runs counter to the congressional policy, expressed in the Interstate Commerce Act, to foster an efficient national railroad system. In other legislation, however, like the Railway Labor and Norris-LaGuardia Acts, Congress has acted on the assumption that collective bargaining by employees will also foster an efficient national railroad service. It passed such Acts with knowledge that collective bargaining might sometimes increase the expense of railroad operations because of increased wages and better working conditions. It goes without saying, therefore, that added railroad expenditures for employees cannot always be classified as 'wasteful'. It may be, as some people think, that Congress was unwise in curtailing the jurisdiction of federal courts in railroad disputes as it did in the Norris-LaGuardia Act. Arguments have even been presented here pointing to the financial debilitation of the respondent Chicago & North Western Railroad and to the absolute necessity for the abandonment of railroad stations. These arguments, however, are addressed to the wrong forum. If the scope of the Norris-LaGuardia Act is to be cut down in order to prevent 'waste' by the railroads, Congress should be the body to do so. Such action is beyond the judicial province and we decline to take it. * * *"

Each of Appellants' contentions and arguments here was covered by this Honorable Court in the Telegraphers case and each contention was laid to rest.

In the case of *Afran Transport Company v. National Maritime Union,* 169 F. Supp. 416, a motion for preliminary injunction to restrain picketing was denied and the Court therein set out a review of the Norris-LaGuardia Act holding that the act barred the issuance of an injunction even in the case of a claimed secondary boycott or violation of state laws.

In the case of *A. H. Bull Steamship Co. v. SIU,* 250 F. 2d 326, (cert. denied) 78 S. Ct. 411, the Court held that an injunction would not lie to enjoin a peaceful strike in cases involving labor disputes, even though the strike might be in violation of collective bargaining agreements, by reason of the Norris-LaGuardia Act.

Another case closely in point on the facts is the case of *Butte, Anaconda & Pacific Railway Company v. BofLF&E, et al.,* 268 F. 2d 54, cert. den., 80 S. Ct. 122), where changes in working conditions were instituted by the Railroad while mediation was pending. The strike resulted and a State Court injunction was issued. Upon removal the injunction was dissolved upon the basis of Norris-LaGuardia and violations of the Railway Labor Act.

An attempt was made by a motor freight line in *Lee Way Motor Freight, Inc. v. Keystone Freight Line, et al.,* 126 F. 2d 931 to assert that the Norris-LaGuardia Act did not apply when the purpose of the strike was contrary to provisions of the Interstate Commerce Act Title 49, Sections 301-327, but an injunction granted was dissolved by the Court, which stated:

> "(4, 5) The Motor Carrier Act, supra, places upon a common carrier of freight in interstate commerce certain duties and responsibilities toward the public, and ordinarily such duties and responsibilities are paramount to private rights. But whatever other remedies

> may or may not be available, there is nothing in the exactions of the Motor Carrier Act which operates to enlarge beyond the limitations of the Norris-LaGuardia Act the jurisdiction of a United States Court in respect to the issuance of a restraining order or a temporary or permanent injunction in a controversy involving or growing out of a labor dispute.

Again in *East Texas Motor Frt. Lines v. International Brotherhood of Teamsters, etc., Local 568, et al.*, 163 F. 2d 10, a similar contention was raised that Norris-LaGuardia did not apply because what was being done was in violation of the Interstate Commerce Act, but an order denying injunctive relief was affirmed, and Honorable Judge Hutcheson said:

> "We cannot agree with appellant. Without at all giving our approval to the acts of the defendants sought to be enjoined or taking issue with Appellant's claim that the acts of the defendants were illegal and might have been enjoined in a state court suit, we are in no doubt that the case is wholly unlike those dealt with in Allen Bradley Co. v. Union, 325 U.S. 707, 65 S. Ct. 433, 89 L. Ed. 570, or Philadelphia Rec. Co. v. Manufacturing Photo-Engravers Ass'n, 3 Cir., 155 F. 2d 799; and is one arising out of a labor dispute. *Neither are we in any doubt that since it is one so arising, Plaintiff, not having complied, or attempted to comply, with the Norris-LaGuardia Act is in effect seeking to enlarge the jurisdiction of the federal courts as limited by that act by its claim that the court should issue the injunction because the acts complained of are violations of duties or obligations arising under the Interstate Commerce Act,* 49 *U.S. C.A., Sec.* 1 *et seq.* Lee Way Motor Freight, Inc. v. Keystone Freight Lines, 10 Cir., 126 F. 2d 931, a case directly in point, so decides; and we are in no doubt that it was well decided. The order appealed from is affirmed." (Emphasis supplied).

See also *Alcoa S. S. Co. v. McMahon*, 173 F. 2d 567 (cert. den.); *W. L. Mead, Inc. v. International Brotherhood of Teamsters Local No. 25*, 217 F. 2d 6.

The inclusion of the provision for the protection of employees in the act Sec. 5 (2) (f) does not serve as the sole and only provision for employees protection in cases of abandonments, mergers and consolidations. This is obvious from *Railway Labor Executives Association v. United States*, 70 S. Ct. 530, where this Honorable Court said:

> "We conclude, therefore, that the Commission, while required to observe the provisions of the second sentence of Section 5 (2) (f) as a minimum protection for employees adversely affected, is not confined to the four-year protective period as a statutory maximum."

and also in *Arnold, et al. v. L&N RR Co.*, 180 F. Supp. 429, where it is held that even though the ICC's authority to provide protection for employes as a condition to its approval of abandonments, consolidations, mergers, etc., that the employees had a right through their duly authorized representatives to enter into agreement with the Railroad as to the terms, conditions and arrangements for their own protection and could make provisions therefor by adopting, supplementing and implementing the provisions made by the Commission for their protection, and that such agrement then takes the place of the order of the Commission on such subject matter.

Petitioners have cited a series of cases[1] to the effect

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[1] Brotherhood of Railroad Trainmen v. Chicago R&I R. Co., 353 U.S. 30;
Virginia R. Co. v. System Federation, 300 U.S. 515;
BofRT v. Howard, 343 U.S. 768;
BofRT v. Denver & R.G.W. R. Co., 290 F. 2d 266 (cert. den.);
State v. L&N R. Co., 323 US 192;
Cont'd

that Norris LaGuardia is inoperative by judicially created exceptions which have been carved out of the broad domain of said act. These authorities constitute reconciliations of Norris-LaGuardia with specific later legislation or are cases where discrimination because of color was involved. But none go as far as holding that the Transportation Act can be used to circumvent the plain and unrepealed mandates of the Railway Labor Act and the Norris-LaGuardia Act requiring that all mediation efforts be used before an injunction will lie. There is much said in Petitioners' application to the effect that an I.C.C. directive is being thwarted, but the plain fact is that the I.C.C. directive is being used to avoid and evade the requirements of the Railway Labor Act.

The case of *B&O R. Co. v. Chicago River & I.R. Co.*, 170 F. 2d 654 (cert. den.), 69 S. Ct. 811, cited by Petitioner is readily distinguishable as not being in point because no labor dispute was involved. It is observed that the Court held, at page 657:

> "Concededly, if the Norris-LaGuardia Act is applicable, the Court was without jurisdiction because under Section 7 of that Act, jurisdiction is withheld from the District Court to issue an injunction in a case to which the act is applicable unless the complaint makes numerous specifically designated allegations under oath. No such allegations appear in the complaint in this suit." * * *

the Court then in discussing the *Lee Way Motor Freight v. Keystone Freight Lines* case said:

Tunstall v. BofLF & E. 323 U.S. 210;
Graham v. BofLF & E. 338 U.S. 232;
Lowden v. U.S. 308 U.S. 225;
Textile Workers v. Lucilon Mills, 353 U.S. 448;
Independent Petroleum Workers v. Esso Standard Oil Co., 235 F. 2d 401.

> "* * * it is clear that there was a labor dispute between the Plaintiff and its own employees which had resulted in a strike, and that Plaintiff, the employer, was seeking the aid of the general equity power of the Court to break the strike. An injunction was refused because a labor dispute was involved within the meaning of the Norris-LaGuardia Act.
>
> 'In our case the Plaintiff carrier and the River Road and its employees did not stand in the position of employer and employee, and *there was no labor dispute between them;* consequently the Lee Way case is not in point." (Emphasis supplied).

and for the opposite reason the *Baltimore & Ohio v. Chicago River* case, (supra) is not in point. There being no labor dispute, Norris-LaGuardia did not apply and the case is not authority for holding that the Transportation Act supersedes the Railway Labor Act and Norris-LaGuardia.

Respondents contend further, that not only have Petitioners failed to comply with those provisions of the Railway Labor Act forbidding changes in working rules and conditions by instituting such changes during the mediation period, they have also violated Section 108 of the Norris-LaGuardia Act (29 U.S.C. 108). The provisions of that section requiring the Complainant to make every reasonable effort to settle such dispute either by negotiations or with the aid of available governmental machinery has not been complied with by Petitioners. In this circumstance no injunction will lie. *See Order of Railroad Telegraphers v. Chicago & N.W. R.R. Co.*, 80 S. Ct. 761; *Butte, Anaconda & Pacific Ry. Co. v. Bof LF& E*, 268 F. 2d 54 (cert. den.), 80 S. Ct. 122.

Petitioners have contended that even though the I.C.C. directive is merely permissive and not mandatory, they

had no option to operate otherwise than they did. This is rather strange since the commission itself provided its order was for "*continued operations* by Texas And New Orleans Railroad Company of port facilities at Corpus Christi", and that one of the only two primary issues considered by it was "the construction and other proposals necessary to obtain a substitute route for *continued operations* by the T&NO in serving *the same* port *area*". Appellants have ignored this and T&NO has given up its "continued operation" of the "same port area" and transferred such work to the CCTA, thus depriving the T&NO employees of their work during the years T&NO does not operate the CCTA (which it does this year). T&NO contends it must use the CCTA substitute because MoPac will not permit it to use MoPac tracks to get to its own tracks. This is an obvious collusion since T&NO does use the tracks when it operates the CCTA.

The Petitioners have likewise even ignored their own agreements in their joint train yard operation, which permits joint operations only on specified tracks in the new yards. T&NO and Tex-Mex now jointly operate over Tex-Mex tracks in the whole of the Corpus Christi Terminal, thus depriving Tex-Mex employees of their work.

The Interstate Commerce Commission itself, in its decision and opinion in Finance Docket 19432, *Chicago, St. Paul, Minneapolis & Omaha Railway Company Lease* (Appendix "B", had proposed to it a similar contention to the effect that because of the exclusive and plenary authority vested in the Commission, Section 6, and related sections of the Railway Labor Act are inapplicable, and that the carrier be relieved of the restraints of such act. The Commission declined to so hold, but did hold that Section 5

(2) (f) of the Transportation Act only authorizes imposition of duties on employers, not employees, and that its orders are permissive, and do not provide any particular method for integration of the physical properties involved and do not deal with employer-employee relationships except for those conditions imposed for protection of employees.

And also in the present case, the orders of the Commission were permissive only, as is seen from the following language, *"It is further ordered,* that, *if* the abandonment and construction herein authorized are exercised, * * *" and *"It is further ordered,* that, *if* the authority granted in this certificate and order has not been exercised within one year from its date, it shall be of no further force or effect (R. 43).

The basis of the strike was set out in Respondents' telegrams to the three Railroads. The testimony discloses that BofRT objected to the deprivation of the work for its members on both T&NO and Tex-Mex Lines. It has only been the single minded purposefulness of the carriers to force their changes upon the employees without consideration of their rights that prevented the agreements. They sought to bolster their positions by securing I.C.C. approval of the changes, yet the joint yard and the CCTA operation of the T&NO's port tracks were instituted before even an application with the Commission was filed.

Consequently the whole matter boils down to a main proposition. Can the Railroads avoid and evade the requirements of the Railway Labor Act to use mediation machinery on proposed changes, or must they follow the clear mandate of the Railway Labor Act in making no changes during the mediation period. We think so, as did the Courts

below. It then follows the Norris-LaGuardia Act prevents an injunction against the self help sought by the employees.

The Honorable Court of Appeals caught the real problem involved herein and dealt with it in such language and reasoning that it cannot be better stated:

> "The essence of the appellants' objective is to unilaterally set certain provisions in a new labor contract in accord with the proposed changes in the Primary Agreement, and to be relieved of an existing labor contract without having to go through the machinery of the Railway Labor Act (the reformation procedure for railway labor contracts) or being subjected to one of the penalties for breach—a strike. They have attempted to accomplish this objective by including such detail in the Primary and supplementary agreements submitted to the ICC for approval as to determine the major provisions of a new labor contract, although at no time were the unions brought into the negotiation of these agreements. The appellants then argue that ICC approval of the agreements makes them binding on the unions. If so, not only does section 5 give the Commission power to approve a section 5 (2) transaction, but it gives the carriers the right to legislate the terms of a continuing contract with a third party, although a different contract more favorable to the third party might have been equally acceptable to the Commission. We do not feel the statute may be so interpreted.
>
> "Section 5 (2) involves "transactions" to achieve certain stipulated ends; these transactions require the approval of the Commission. There is no definition given of what goes into a "transaction," but it appears to be a catchall descriptive term referring to the many different elements involved in mergers, leasing agreements, pooling arrangements, or joint operations. As often described in other contexts, it is a word "of

flexible meaning" and "may comprehend a series of many occurrences, depending not so much upon the immediacy of their connection as upon their logical relationship." See *Cantrell v. City of Caruthersville*, Mo., 1949, 221 S.W. 2d 471, 474; *Kaumagraph Co. v. General Trade Mark Corp.*, D.C.N.Y., 1935, 12 F. Supp 230. Apparently the Commission feels that one of the occurrences or elements involved may be contracts and agreements between interested parties to the transaction, since its regulations require that there be attached to any application for approval of a 5 (2) transaction "a copy of any contract or other written instrument entered into or proposed to be entered into pertaining to the transaction covered by the application." 49 C.F.R. § 52.3 (b) (7). It would further appear from section 5 (2) (c) and (f) that the representatives of the carrier employees are included among the interested parties to a transaction and that a new labor contract may be one of the ingredients of a transaction. Now, are we to read into the authority of the ICC to "approve" a transaction, the right of the carrier to unilaterally create one of the contracts which may be necessary to the completion of that transaction and thereupon bind a third party to it? Clearly, that does not follow as a matter of course from the normal meaning of the terms used in section 5 (2) (a).

"Nor has the ICC, in its interpretation of section 5 (2), found any such hidden authority. It looks upon its duties as purely permissive, approving with appropriate conditions contracts, agreements, and consolidations which are negotiated by the parties under the normally applicable law governing such transactions in other fields. As the Commission has often held, it has no power to compel a carrier to undertake a section 5 (2) transaction. See, *e.g.*, *Baltimore & O. R. Co. Operation*, 261 ICC 535, 544; *Gulf M. & O. R.*

Co. Purchase, 267 ICC 265, 269-70; *Chicago, Saint Paul, M. & O. R. Co. Lease*, 295 ICC 696. Further, it has been unwilling to take upon itself questions of either the interpretation or enforceability of contracts submitted with respect to a transaction. Upon occasion, parties, who have come before the Commission with executory contracts to take effect upon approval by the Commission, wish to withdraw from the proceeding. As the Commission said in refusing to dismiss the proceeding in *McGary Transportation Co. — Purchase (Portion) — Albert J. Demelle*, 50 MCC 608, 611 (1948):

> "As to vendor's desire to withdraw from the transaction, we have repeatedly found that authority granted under former section 213 and present section 5 is permissive only, and may, or may not, be exercised by the parties, and that all matters involving the interpretation and enforcement of the terms of contracts must be left for settlement between the parties themselves or by the courts."

See also, *Watson Bros. Transp. Co. v. Jaffa*, 8 Cir., 1944, 143 F. 2d 340; *O. C. Wiley & Sons v. United States*, W. D. Va., 1949, 85 F. Supp. 542; *Marion Trucking Co. — Purchase — Harwood Trucking Co.*, 50 MCC 613, 632 (1948); *The Service Transport Co. — Purchase (Portion) — F. E. Kerr Co.*, 59 MCC 481.[4] Even where a carrier has transferred the same rights and equipment to two different parties, the Commission has held that it must treat each application on its merits and let the two vendees litigate their conflict in the courts. *Yellow Coach Corp. — Purchase — O. B. Darnell*, 59 MCC 185, 193-94. From

[4] "Authority granted under section 5 is permissive only, and, in the event of a dispute, the contractual rights and obligations of the parties are for determination by the courts rather than by us." 59 MCC at 484.

these cases, we believe the Commission is of the opinion that the carriers must rely upon applicable contract and corporate law to carry their section 5 (2) transaction into effect, and may not rely upon the Commission's "approval" to coerce a recalcitrant party into line. Further, we feel that it would be inconsistent with this construction of the statute to hold that, while the carriers must look to local law to enforce the transaction, unions and other noncarrier parties are bound without their consent by the Commission's permissive approval.

The appellants also argue that when the Commission conditions its approval upon the inclusion of employee protective provisions under section 5 (2) (f), these conditions bind the employees upon the carriers' decision to go through with the transaction. As already noted, however, the Commission has held that it has authority to impose conditions only on the carrier. *Chicago, Saint Paul, M. & O. R. Co. Lease*, 295 ICC 696, 701. Further, we can see little purpose to the last sentence of section 5 (2) (f) if the most that the unions can bargain for is what they can obtain by right from the Commission. This sentence provides:

> "Notwithstanding any other provision of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

To permit the railway unions to enter into an agreement, yet deny them the full use of their bargaining power, i.e., the strike, would make the provision meaningless. On the other hand, by giving it full latitude, we achieve a result consistent with our basic view of section 5 (2): that to carry an approved transaction into effect, the parties must rely upon agreements voluntarily entered into and enforced under

> local law. In accord with this reasoning, the Commission has refused to hear employee complaints when a protective agreement has been entered into by the parties, enforceable under the applicable local law. *DeCamp Bus Lines — Purchase — Atlantic Transport Co.*, 65 MCC 452, 456."

Even though Petitioners have not set out in their application any statement as a "question presented" covering a claimed error of the Courts below, their failure to consider the injection into the case a question of "time claims" of employes because of the unilateral changes instituted by the Petitioners, they nevertheless have again brought such matter forward in the body of their application.

There was no evidence adduced during the trial, either by testimony of Respondents' witnesses or by admissions, stipulations of documentary proof that Respondents' based their strike in part on any demand for payment of time claims due to the changes made while mediation was in progress.

This came into the picture only through the testimony of Petitioners' witnesses, L. C. Albert (R. 165-167, 172-173), D. E. Walker (R. 193), and E. F. Wright, Jr. (R. 207), which was to the effect that settlement negotiations reached an impasse because payment of time claims was injected into the settlement negotiations.

Objection was made that such testimony was wholly immaterial which was overruled by the Court's "allowing" the testimony. Further objection was made that the testimon was self-serving and could be no basis for the conclusion by the Court since the same was part of and a matter under negotiation by the parties. Again the testimony was "allowed" by the Court.

It is elementary that offers of compromise or settlement are not admissible. Any negotiation during mediation for

settlement of this labor dispute would be nothing more than an offer of compromise or settlement and the Trial Judge correctly ignored the evidence which he "allowed".

The real and true basis of the purpose of the strike was stated in the telegrams to B. W. Smith, Ben F. Wright and L. C. Albert (Ex. 18, 19, 20 S.R.) which was to the effect that it was called because of the *Carrier's failure to abide by the provisions of the Railway Labor Act in handling mediation cases.*

The Petitioners' Complaint contained no averments or allegations that a minor dispute was involved because of "time claims". No motion for new trial was made or rehearing requested on such theory. This matter was not included as one of the questions presented in Petitioners' Application for Writ of Certiorari. Therefore, such contention is not one properly raised on appeal.

CONCLUSION

Respondents would respectfully show that Petitioners original complaint seeking an injunction was properly denied by the Trial Court, and such action was properly affirmed by the Court of Appeals upon the basis (1) that the Federal Courts do not have jurisdiction to grant injunctions to prevent strikes in a labor dispute, where the procedures of the Railway Labor Act have been fully followed by Respondents, and (2) that the securing of a permissive order by Petitioners from the Interstate Commerce Commission covering changes in rules, working conditions and established practices, does not deprive Respondents from asserting self-help to secure an agreement covering such changes. There is no conflict between a decision of the Honorable Court of Appeals

and any other Court of Appeals or with any decision of this Honorable Court. The matters presented have been properly and correctly decided by the Courts below, and the Writ of Certiorari prayed for by Petitioners should be in all things denied.

Respectfully submitted,

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APPENDIX "A"

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 19432

CHICAGO, SAINT PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY LEASE

Decided May 5, 1958

Supplemental application of Chicago and North Western Railway Company for supplemental order under section 5(9) of the Interstate Commerce Act, as amended, dismissed. Prior report 295 I.C.C. 441.

Appearances as in previous report, and *Harold N. McLaughlin* and *James L. Highsaw, Jr.*, for interveners in opposition.

SUPPLEMENTAL REPORT OF THE COMMISSION

BY THE COMMISSION:

On December 28, 1956, the Commission, by division 4, approved and authorized the lease by the Chicago and North Western, of the lines of railroad and other properties owned, used, or operated by the Chicago, Saint Paul, Minneapolis and Omaha Railway Company, hereinafter sometimes referred to as the Omaha. *Chicago, St. P., M. & O. Ry. Co. Lease*, 295 I.C.C. 441. The so-called Oklahoma conditions, shown in *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177, were prescribed to protect employees who might be adversely affected by the transaction.

On July 5, 1957, the North Western filed what it termed an application for supplemental relief, requesting that we, pursuant to our authority under sections 5(9) of the Inter-

state Commerce Act, issue an order supplementing the order of December 28, 1956, which supplemental order shall (a) direct the parties to this proceeding[1] immediately to undertake discussions for the purpose of carrying out the integration and unification authorized by the order of December 28, 1956; (b) direct the parties to report back to this Commission in 60 days the status of their mutual efforts, pursuant to our direction aforementioned; (c) *declare that, in consequence of the exclusive and plenary authority vested in this Commission in respect of the unification of railway carriers, Section 6 and related provisions of the Railway Labor Act are inapplicable and that, in order to enable the parties to carry out the transaction authorized and contemplated by our order of December 28, 1956, the parties to this proceeding are expressly relieved of the restraints, limitations, and prohibitions of all other laws, including expressly Section 6 of the Railway Labor Act;* and (d) grant such other and further relief as we may deem necessary or appropriate in the premises to effectuate the order of December 28, 1956.

On August 30, 1957, the Railway Labor Executives' Association and the Brotherhood of Locomotive Engineers, interveners, filed a joint protest and motion to dismiss or deny the supplemental application on grounds (1) that this Commission lacks jurisdiction to grant the requested relief; and (2) the supplemental application fails to state a claim upon which relief can be granted. North Western replied; and oral argument has been held.

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[1] The "parties to this proceeding" are not otherwise defined. The only persons who are parties to the proceeding when the supplemental application was filed are North Western and the Railway Labor Executives' Association; but it appears that relief is sought against 4 operating labor organizations.

Position of North Western.—Effective January 1, 1957, the North Western leased all the lines of railroad and other properties owned, used or operated by the Omaha pursuant to the authority of the order of December 28, 1956. It immediately initiated efforts towards an integrated and unified operation. In the absence of the prescription by us of specific procedures, the North Western attempted to confer with the labor organizations concerning certain changes in operation. These proposed changes primarily involve a system wide revision and integration of road crew assignments, the integration of caboose runs on through trains, and the integration and unification of yard and terminal operations, particularly at common points served by both carriers prior to the lease.

Under operating contracts, existing at the commencement of the lease, former employees of the Omaha were given seniority rights and the right to perform work by seniority districts over all of that company's properties. Under North Western's seniority arrangements, its employees were given the exclusive right to perform work by seniority districts on North Western's properties. It is proposed to consolidate certain of the separate seniority districts on the 2 roads and to revise other seniority districts. Train seniority districts over the entire systems including the Omaha would be reduced from 24 to 8. Many of the districts involved are far removed from the Omaha, and changes relating thereto would not seem necessarily related to accomplishment of unification between North Western and Omaha.

The North Western has successfully concluded agreements with the non-operating labor organizations providing for rearrangement of seniority districts and other measures permitting the integration of the railroads insofar as

those organizations are concerned. However, no progress has been made in the case of proposed changes involving the so-called operating brotherhoods.[2] The North Western extended an invitation to the labor organizations to meet in conference and discuss the changes, but the latter declined to enter into such discussions and insisted that the former present its proposal in the manner required by the Railway Labor Act, 45 U.S.C. 151, *et seq.* The North Western declined to follow this procedure, taking the position that the Railway Labor Act was not applicable to changes occasioned by a unification authorized under section 5 of the Interstate Commerce Act and that we alone have jurisdiction in the matter.

Position of labor organizations.—The labor organizations on April 26, 1957, invoked the services of the National Mediation Board under Section 5 First, of the Railway Labor Act.[3] The organizations took the position that the dispute concerned (1) the proposals of the carriers for changes and revisions in the written agreements of the North Western and the Omaha, and (2) the refusal of the carriers to hold conferences under the Railway Labor Act. It is their view that the proposals for the revisions of their

[2] These include the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors and Brakemen, and the Brotherhood of Railroad Trainmen.

[3] This section of the act reads in pertinent part as follows:

"The parties, or either party to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rate of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused."

collective bargaining agreements are subject to the requirements of Section 6 of the Railway Labor Act.

The National Mediation Board, after first advising the labor organizations that the Board's file did not show that a Section 6 notice had been served by either party on the other in connection with intended changes in agreements which might result from the consolidation of the North Western and the Omaha, subsequently found that such notice was contained in a communication, by North Western, dated March 18, 1957, indicating generally the character of the operating changes which it wished to discuss. Thereafter, on June 14, 1957, that Board docketed the proceeding as Case No. A-5495. North Western has advised that Board that it cannot concur in any assumption of jurisdiction by such Board under Section 6 which necessarily implies that our jurisdiction is not exclusive and plenary. North Western states that it would meet with the labor organizations under the auspices of the Board on a voluntary basis, but not under the aegis of the Railway Labor Act.

Upon acceptance of jurisdiction by the National Mediation Board the labor organizations under date of June 17, 1957, distributed to their members a strike ballot by which authority is sought to call a strike on the North Western if there is a failure to agree in the course of Section 6 negotiations.

Discussion of contentions and findings. — The North Western stresses that there are 3 aspects of the order of December 28, 1956, which must be in mind with respect to the issues presented by its supplemental application: First, that the order clearly and specifically contemplated an integration of the physical operations of the roads as

well as other aspects of running railroads in that it referred to the physical integration, to the savings and operational costs that could be realized, and to the improvements in service which would be engendered by physical unification of operations; second, that the order provided for inclusion in its scope of the Oklahoma conditions for the protection of employees adversely affected by the transaction; and third, that the order recognized and exerted what appeared to be the full range of the Commission's powers under section 5(11) of the act.

The North Western states that its efforts to integrate the 2 railroads through its lease with the Omaha have reached an impasse, and therefore it has filed the supplemental application, heretofore described, under section 5(9) of the act, invoking sections 5(2)(b) and 5(11) as the basic sources of our jurisdiction for the relief sought. The pertinent portions of such sections of the act appropriately designated are as follows:

> The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate. (Section 5(9).)
>
> If the Commission finds that, *subject to such terms and conditions and such modifications as it shall find to be just and reasonable*, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, *upon the terms and conditions, and with the modifications*, as found to be just and reasonable: * * *." (Italics supplied). (Section 5(2)(b).)
>
> The authority conferred by this section shall be exclusive and plenary, * * * and any carriers or other

> corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal; insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchise acquired through such transaction. (Section 5 (11).)

Northwestern states that it requests us neither to interpret or enforce existing contracts, nor to determine what specific employees will be affected by the proposed operational revisions. It asserts, however, that under section 5 (2) (b) we have the power which may be exercised in appropriate circumstances to condition our approval of proposed unifications on the accomplishment of specified operational revisions which may be deemed necessary to assure realization of the greater operating efficiencies and economics in contemplation. On this basic premise, it requests that we exercise authority under section 5 (2) (b) to prescribe procedures under which, with reference to the authority granted under the order of December 28, 1956, the North Western and the interested labor organizations must by conference and negotiation concur in a plan of operational revisions.

Predicated upon the contention that the divergent purposes served by the Railway Labor Act, on the one hand, and section 5 of the Interstate Commerce Act, on the other, render the procedures of the former a positive

barrier to the achievement of the purposes of the latter, North Western requests that express relief be granted from the restraints, limitations, and prohibitions of the Railway Labor Act.

The North Western relies upon the decision of the United States Court of Appeals, *Kent v. Civil Aeronautics Board*, 204 F. 2d 263 (2d Cir. 1953), cert. den. 346 U.S. 826 (1953), in confirmation of its position as to our authority under section 5. The *Kent* case arose out of the action of the Civil Aeronautics Board in approving, pursuant to provisions of the Civil Aeronautics Act of 1938, following direction of the President, the acquisition of American Overseas Airlines by Pan American World Airways, *North Atlantic Route Transfer Case*, 11 CAB 676 (1950). In a subsequent supplemental opinion that Board addressed itself to the matter of protection of employees of the carriers involved and imposed conditions for the protection of adversely affected employees similar to those imposed by this Commission in section 5(2) proceedings. A difficulty with respect to the integration of some groups of employees was encountered. The Board at first left the solution of such problem to be settled by negotiation by the interested parties and, failing such settlement, to be submitted to arbitration, *North Atlantic Route Transfer Case*, 12 CAB 124 (1950). Some groups of employees did settle their differences by negotiation. In the case of others, agreement was not achieved and the services of the National Mediation Board were invoked. Mediation conferences were held by the National Mediation Board and were successful as to certain employee groups, but unsuccessful as to the flight engineers. Thereupon the Civil Aeronautics Board reopened the case and ordered,

according to a formula, the integration of such employees into the Pan American seniority lists. Subsequently, review of the proceeding was petitioned, limited to that portion of the orders of the Civil Aeronautics Board which provided for the integration of the flight engineers of both carriers involved into the seniority list of the surviving carrier.

The basic contention was that the Civil Aeronautics Board was without jurisdiction to make any order determining the respective seniority rights of the flight engineers. The Court, in its opinion, stated that the statutory authority of that Board to deal with proposed mergers was broad enough to enable that Board "to approve a merger and transfer of a certificate upon such terms and conditions as it shall find to be just and reasonable" in the public interest. "Although" it continued, "there is no express statutory grant of power to impose conditions which will lessen the adverse impact of a merger upon employees of the merged companies, such power is implicit as one necessary to the performance of the Board's duty to condition approval with due regard to terms which are just and reasonable in the interest of the public".

The orders of the Board under attack, went beyond affording financial protection and prescribed a seniority list which the Pan American had to adopt. In this connection, the court said:

> " * * * when a merger involves two or more groups of employees each having separate seniority rights, the public interest in maintaining peaceful labor relations so as to effect an orderly continuation of operations is not always satisfied merely by conditioning approval of the merger on financial protection of the

> employees. Industrial strife may arise by reason of a dispute between the two or more employee groups as to how a unified seniority list should be drawn. And when such a dispute develops, it is within the power of the Board to order the carrier to follow whatever course is necessary and appropriate. An overall supervision of the merging carrier so as to protect adequately the public interest is what Sec. 408 (b) of the Act contemplates, and that is what these orders accomplish. The same power to order the initial integration justifies the Board's further requirement that the employer refrain from making any labor contract in the future which will not conform to it."

It is important to note that the decision in the *Kent* case holds that the power of the Board is to direct the carrier. No requirement was made upon employees. Likewise under section 5 of the act *we merely authorize or permit* the applicant carriers to enter into a proposed transaction. *We may not even compel the carriers to consummate an authorized transaction.* See *Valdosta S.R. Purchase*, 282 I.C.C. 705, 711; *Coordinated-Purchase-Merrilatt*, 56 M.C.C. 635.

Under Section 5(2)(f) of the act, we are *required* to impose upon the carriers in each approved transaction, conditions for the protection of railroad employees affected. *But this section only authorizes the imposition of duties upon the carrier. It does not authorize us to direct the employees or organizations of employees to do anything. Thus, North Western's request that we order such parties to negotiate and report back to us must be denied.*

The North Western has further requested that we issue a supplemental order which shall declare that, in consequence of exclusive and plenary authority vested in this

Commission in respect to the unification of railway carriers, section 6 and related provisions of the Railway Labor Act are inapplicable, and that, in order to enable the parties to carry out the transaction authorized and contemplated by the order of December 28, 1956, the parties to the proceeding are expressly relieved of the restraints, limitations, and prohibitions of all other laws, including expressly section 6 of the Railway Labor Act. In requesting such a declaration by us, North Western relies primarily upon the provisions of paragraph 11 of section 5, *supra*. *We find nothing in that paragraph, or in other portions of section 5, which authorizes us to determine and declare the particular laws within the scope of paragraph (11) from which a carrier shall be relieved.* The terms of this paragraph are self-executing, and *there is no need for this Commission expressly to order or declare that a carrier be relieved from certain* restraints. It is sufficient if we make clear what the carrier is authorized to do. *Seaboard Air Line R. Co. v. Daniel*, 333 U.S. 118. *Congress has not conferred upon us the power to determine the disputes which are subject to the Railway Labor Act or questions regarding the jurisdiction of the National Mediation Board, which, in effect, is what North Western requests us to do.*

It is apparent that *the Railway Labor Act has not prevented the North Western from effectuating the transaction authorized by the prior order. That order authorized the lease by North Western of the lines of railroad and other properties owned, used, or operated by the Omaha, and this has been accomplished.* The order did not provide any particular method for integration of the physical operations involved; and, except for the imposition of the

above-mentioned conditions for the protection of employees, did not deal with employer-employee relationships.

In view of the foregoing, we find that we have no authority to grant the relief which North Western requests, and its supplemental application will be dismissed.

An appropriate order will be entered.

GOFF, Commissioner, did not participate in the disposition of this proceeding. (Emphasis supplied).

APPENDIX "B"

362 U.S. 330—Order of Railroad Telegraphers, et al., Petitioners, v. Chicago and North Western R. Co., a corporation, No. 100:

Mr. Justice BLACK delivered the opinion of the Court.

According to the verified complaint filed in a United States District Court in Illinois by the respondent, Chicago & North Western Railway Company, against the petitioners, the Order of Railroad Telegraphers and its officials, "This is an action for injunction to restrain and enjoin the calling and carrying out of a wrongful and unlawful strike or work stoppage on plaintiff's railroad." Section 4 of the Norris-LaGuardia Act provides, however, that "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of *any labor dispute* to prohibit any person or persons * * * from * * * (a) Ceasing or refusing to perform any work or to remain in any relation of employment; * * *[1] The main question in this case then was, and still is, whether this prohibition of the Norris-LaGuardia Act bars an injunction in the circumstances of this case.

Respondent railroad, owning and operating a rail system of over 9,000 miles in the States of Illinois, Wisconsin, Iowa, Minnesota, Michigan, Nebraska, South Dakota, North Dakota, and Wyoming, is an integral part of the nationwide railway system important to the transportation of passengers and freight in interstate commerce. When the railroad began operations, about 100 years ago, traffic was such that railroad stations were established about 7 to 10

[1] 47 Stat. 70, 29 U.S.C. § 104, 29 U.S.C.A. § 104. (Emphasis supplied.)

miles apart. Trucks, automobiles, airplanes, barges, pipelines and modern roads have reduced the amount of railroad traffic so that the work now performed at many of these stations by agents is less than one hour during a normal eight-hour day. Maintenance of so many agencies where company employees do so little work, the complaint alleges, is wasteful and consequently in 1957 the railroad filed petitions with the public utility commissions in four of the nine States in which it operated asking permission to institute a "Central Agency Plan whereby certain stations would be made central agencies * * *" and others abolished. The plan would necessarily result in loss of jobs for some of the station agents and telegraphers, members of the petitioner union. A few weeks after the state proceedings were filed and before any decision had been made, the petitioner union, the duly recognized, certified and acting collective bargaining agent for the railroad's employees, notified the railroad under § 6 of the Railway Labor Act, 45 U.S.C.A. § 156, 45 U.S.C.A. § 156, that it wanted to negotiate with the railroad to amend the current bargaining agreement by adding the following rule:

> "No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization."

The railroad took the position, according to its complaint, that this request did not constitute a "labor dispute under the Railway Labor Act," that it did not raise a bargainable issue, and that the union had no right to protest or to seek relief except by appearing before the state public utility commissions which had power to determine whether station agencies could be discontinued, a power which private parties could not thwart by entering into a bargaining agreement. The respondent added that maintenance of the

unnecessary agencies was offensive to the national transportation policy Congress adopted in the Interstate Commerse Act, 49 U.S.C. §§ 1-27, 49 U.S.C.A. §§ 1-27, and that the duties that Act imposed on railroads could not be contracted away.

The union contended that the District Court was without jurisdiction to grant injunctive relief under the provisions of the Norris-LaGuardia Act because this case involved a labor dispute, and that the railroad had refused to negotiate in good faith on the proposed change in the agreement in violation of § 2, First, of the Railway Labor Act, 45 U.S.C. § 152, First, 45 U.S.C.A. § 152, subd. 1, which requires the railroad to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions. Therefore, the union argued, an injunction in federal court is barred if for no other reason because of § 8 of the Norris-LaGuardia Act which provides:

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." 29 U.S.C. § 108, 29 U.S.C.A. § 108.

See Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. R., 321 U.S. 50, 64 S. Ct. 413, 88 L. Ed. 534.

After hearings, the District Court found, so far as is relevant here, that the railroad "refused to negotiate, confer, mediate or otherwise treat with defendant Telegraphers on the proposed change in agreement set forth in the Section 6 notice," although the railroad "did show willingness to negotiate upon the central agency plan, including a possibility concerning severance pay"; that the proposed

contract change referred to in the § 6 notice "relates to the length or term of employment as well as stabilization of employment" and that collective bargaining as to the length or term of employment is commonplace; that "The dispute giving rise to the proposed strike is a major dispute and not a minor grievance under the Railway Labor Act, and no issue involved therein is properly referable to the National Railroad Adjustment Board";[2] and that the contract change proposed in the § 6 notice related to "rates of pay, rules and working conditions," and was therefore a bargainable issue under the Railway Labor Act. On its findings and conclusions of law, the District Court granted temporary relief but declined to grant a permanent injunction on the ground that it was without jurisdiction to do so.

[1] On appeal the Court of Appeals did grant a permanent injunction upon its decision that "The District Court's finding that the proposed contract change related to 'rates of pay, rules, or working conditions,' and was thus a bargainable issue under the Railway Labor Act, is clearly erroneous."[3] It held that the Norris-LaGuardia Act did not apply to bar an injunction against this strike[4] and we

[2] See Brotherhood of Railroad Trainmen v. Chicago River & I. R. Co., 353 U.S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622.

[3] Chicago & N. W. R. Co. v. Order of Railroad Telegraphers, 264 F. 2d 254, at page 260.

[4] Ibid. See Brotherhood of Railroad Trainmen v. New York Central R. Co., 6 Cir., 246 F. 2d 114. But see A. H. Bull Steamship Co. v. Seafarers' International Union, 2 Cir., 250 F. 2d 326.

At the time of the District Court's decision, two States (South Dakota and Iowa) of the four in which the railroad sought permission to institute its Central Agency Plan (the other two were Minnesota and Wisconsin) had granted permission and the plan was promptly placed in effect. Since then, we are given to understand, the commissions in the remaining two States have issued orders approving the plan.

granted certiorari, 361 U.S. 809, 80 S. Ct. 56, 4 L. Ed. 2d 58, to consider this important question.[5]

[2] We hold, with the District Court, that this case involves or grows out of a labor dispute within the meaning of the Norris-LaGuardia Act and that the District Court was without jurisdiction permanently to enjoin the strike.

Section 4 of the Norris-LaGuardia Act specifically withdraws jurisdiction from a District Court to prohibit any person or persons from "[c]easing or refusing to perform any work or to remain in any relation of employment" "in any case involving or growing out of any labor dispute" as "herein defined."[6] Section 13 (c) of the Act defines a labor dispute as including,

> "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."[7]

Unless the literal language of this definition is to be ignored, it squarely covers this controversy. Congress made the definition broad because it wanted it to be broad. There are few pieces of legislation where the congressional hearings, committee reports, and the language in the legislation itself more clearly point to the necessity for giving an Act a construction that will protect the congressional

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[5] Compare Marine Cooks & Stewards v. Panama Steamship Co., 362 U.S. 365, 80 S. Ct. 779.

[6] 29 U.S.C. § 104, 29 U.S.C.A. § 104.

[7] 29 U.S.C. § 113(c), 29 U.S.C.A. § 113(c).

policy the Act adopted. Section 2 of this Act specifies the public policy to be taken into consideration in interpreting the Act's language and in determining the jurisdiction and authority of federal courts; it is one of freedom of association, organization, representation and negotiation on the part of workers.[8] The hearings and committee reports reveal that Congress attempted to write its bill in unmistakable language because it believed previous measures looking toward the same policy against nonjudicial intervention in labor disputes had been given unduly limited construction by the courts.[9]

Plainly the controversy here relates to an effort on the part of the union to change the "terms" of an existing collective bargaining agreement. The change desired just as plainly referred to "conditions of employment" of the railroad's employees who are represented by the union. The employment of many of these station agents inescapably hangs on the number of railroad stations that will be either completely abandoned or consolidated with other stations. And, in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment. The District Court's finding that "[c]ollective bargaining as to the length or term of employment is commonplace," is not challenged.

[3] We cannot agree with the Court of Appeals that the union's effort to negotiate about the job security of its members "represents an attempt to usurp legitimate man-

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[8] 29 U.S.C. § 102, 29 U.S.C.A. § 102.

[9] See Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797, 805, 65 S. Ct. 1533, 1538, 89 L. Ed. 1939; United States v. Hutcheson, 312 U.S. 219, 230-236, 61 S.Ct. 463, 465-468, 85 L. Ed. 788; Milk Wagon Drivers' Union Local 753 v. Lake Valley Farm Products Inc., 311 U.S. 91, 102-103, 61 S. Ct. 122, 127-128, 85 L. Ed. 63.

agerial prerogative in the exercise of business judgment with respect to the most economical and efficient conduct of its operations."[10] The Railway Labor Act and the Interstate Commerce Act recognize that stable and fair terms and conditions of railroad employment are essential to a well-functioning national transportation system. The Railway Labor Act safeguards an opportunity for employees to obtain contracts through collective rather than individualistic bargaining. Where combinations and consolidations of railroads might adversely affect the interests of employees, Congress in the Interstate Commerce Act has expressly required that before approving such consolidations the Interstate Commerce Commission "shall require a fair and equitable arrangement to protect the interests of the railroad employees affected."[11] It requires the Commission to do this by including "*terms and conditions*" which provide that for a term of years after a consolidation employees shall not be "in a worse position with respect to their employment" than they would otherwise have been.[12] (Emphasis supplied.)

In 1942 this Court held that when a railroad abandons a portion of its lines, the Interstate Commerce Commission has power to include conditions for the protection of displaced workers in deciding what "the public convenience and necessity may require." We so construed the Interstate Commerce Act specifically on the basis that imposition of such conditions "might strengthen the national system through their effect on the morale and stability of railway

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[10] 264 F. 2d at page 259.

[11] 49 U.S.C. § 5(2) (f), 49 U.S.C.A. § 5(2) (f). And see § 5(2) (c).

[12] 49 U.S.C. § 5(2) (f), 49 U.S.C.A. § 5(2) (f).

workers generally." Interstate Commerce Comm. v. Railway Labor Exec. Ass'n, 315 U.S. 373, 375, 62 S.Ct. 717, 720, 86 L.Ed., 904, citing United States v. Lowden, 308 U.S. 225, 60 S.Ct. 248, 84 L.Ed. 208. The brief for the railroad association there called our attention to testimony previously given to Congress that as early as 1936 railroads representing 85% of the mileage of the country had made collective bargaining agreements with their employees to provide a schedule of benefits for workers who might be displaced or adversely affected by coordinations or mergers.[13] In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bargain collectively. Furthermore, the whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees themselves. It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interestss of the employees as will as the interests of the railroad and the public at large.

[4, 5] The railroad has argued throughout the proceedings that the union's strike here may be enjoined, regardless of Norris-LaGuardia, because its effort to bargain about the consolidation and abandonment of railroad stations is unlawful. It is true that in a series of cases where collective bargaining agents stepped outside their legal duties and violated the Act which called them into being, we held

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[13] Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 2531, 76th Cong., 1st Sess. 216-217.

that they could be enjoined.[14] None of these cases, however, enjoined conduct which the Norris-LaGuardia Act withdrew from the injunctive power of the federal courts except the Chicago River case which held that a strike could be enjoined to prevent a plain violation of a basic command of the Railway Labor Act "adopted as a part of a pattern of labor legislation." 353 U.S. 30, 42, 77 S.Ct. 635, 641. The Court there regarded as inapposite those cases in which it was held that the Norris-LaGuardia Act's ban on federal injunctions is not lifted because the conduct of the union is unlawful under some other, nonlabor statute.[15]

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[14] Brotherhood of Railroad Trainmen v. Chicago River & I. R. Co., 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed. 2d 622; Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283; Graham v. Brotherhood of Locomotive Firemen & Enginemen, 338 U.S. 232, 70 S.Ct. 14, 94 L.Ed. 22; Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187; Virginia R. Co. v. System Federation No. 40, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789. See also Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, 457-459, 77 S.Ct. 912, 918-919, 923, 1 L.Ed. 2d 972. And see Steele v. Louisville & N. R. Co., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173.

[15] The Court cited the following cases to show that unlawfulness under nonlabor legislation did not remove the restrictions of the Norris-LaGuardia Act upon the jurisdiction of federal courts: Milk Wagon Drivers' Union Local 753 v. Lake Valley Farm Products, Inc., 311 U.S. 91, 103, 61 S.Ct. 122, 128, 85 L.Ed. 63 (alleged violations of Sherman Act, 15 U.S.C.A. §§ 1-7, 15 note); East Texas Motor Freight Lines v. International Brotherhood of Teamsters, 5 Cir., 163 F. 2d 10, 12 (violation of Interstate Commerce Act and Motor Carrier Act).

Of course, a holding here that mere unlawfulness under any law is enough to remove the strictures of the Norris-LaGuardia Act would require a modification or abandonment of our statement that "For us to hold, in the face of this legislation [the Clayton and Norris-LaGuardia Acts], that the federal courts have jurisdiction to grant injunctions in cases growing out of labor disputes, merely because alleged violations of the Sherman Act are involved, would run counter to the plain mandate of the [Norris-LaGuardia] Act and would reverse the declared purpose of Congress." Milk

Here, far from violating the Railway Labor Act, the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes "concerning rates of pay, rules, and working conditions." 45 U.S.C. § 152, First, 45 U.S.C.A § 152, subd. 1. Moreover, neither the respondent nor anyone else points to any other specific legal command that the union violated here by attempting to bring about a change in its collective bargaining agreement. It would stretch credulity too far to say that the Railway Labor Act, designed to protect railroad workers, was somehow violated by the union acting precisely in accordance with that Act's purpose to obtain stability and permanence in employment for workers. There is no express provision of law, and certainly we can infer none from the Interstate Commerce Act, making it unlawful for unions to want to discuss with railroads actions that may vitally and adversely affect the security seniority and stability of railroad jobs.[16] And for a number of reasons the state public utility proceedings, invoked by the railroad to obtain approval of consolidation or abandon-

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Wagon Drivers' Union Local 753 v. Lake Valley Farm Products, Inc., 311 U.S. 91, 103, 61 S.Ct. 122, 128, 85 L.Ed. 63. See also Lee Way Motor Freight v. Keystone Freight Lines, 10 Cir., 176 F. 2d 931, 934.

[16] Moreover, this railroad operates in nine States; it has instituted proceedings in the state regulatory commissions of four only and at the time of the District Court's decision, only two of these had rendered decisions. Yet the union's proposal was to negotiate for a clause which would apply to respondent's entire system. The railroad's refusal to bargain was not limited, however, to operations in the four States in which proceedin had begun. And even assuming that the order of one State, South Dakota, was mandatory and that this fact is of importance, it would not relieve the railroad from any duty it had to bargain on the proposed contract change in the eight other States involved.

ment of stations, could not stamp illegality on the union's effort to negotiate this whole question with the railroad. The union merely asked for a contractual right to bargain with the railroad about any voluntary steps it might take to abandon stations or to seek permission to abandon stations and thus abolish jobs. Nothing the union requested would require the railroad to violate any valid law or the valid order of any public agency. There is no testimony and there are no findings that this union has set itself up in defiance of any state mandatory order. In fact, there was no state order of any kind at the time the union first asked to negotiate about the proposed contractual change. Even if a Norris-LaGuardia "labor dispute" could not arise out of an unlawful bargaining demand, but see Afran Transport Co. v. National Maritime Union, D. C., 169 F. Supp. 416, 1959 A.M.C. 326, the union's proposal here was not unlawful.

The union contends that, whether the state rulings were mandatory or permissive, the States are without authority to order an abandonment of stations that would conflict with collective bargaining agreements made or to be made between the railroad and the union. Whether this contention is valid or not we need not decide since there is no such conflict before us. And the District Court expressly refused to find that the union's proposal was prompted by the railroad's action in seeking state authority to put its Central Agency Plan into effect. Instead, the District Court specifically found that the dispute grew out of the failure of the parties to reach an agreement on the contract change proposed by the union.

Only a word need be said about the railroad's contention that the dispute here with the union was a minor one relating to an interpretation of its contract and therefore

one that the Railway Labor Act requires to be heard by the National Railroad Adjustment Board. We have held that a strike over a "minor dispute" may be enjoined in order to enforce compliance with the Railway Labor Act's requirement that minor disputes be heard by the Adjustment Board. Brotherhood of Railroad Trainmen v. Chicago River & I. R. Co., 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed. 2d 622. But it is impossible to classify as a minor dispute this dispute relating to a major change, affecting jobs, in an existing collective bargaining agrement, rather than to mere infractions or interpretations of the provisions of that agreement. Particularly since the collective bargaining agreement which the union sought to change was a result of mediation under the Railway Labor Act, this is the type of major dispute that is not governed by the Adjustment Board.

[7] In concluding that the injunction ordered by the Court of Appeals is forbidden by the Norris-LaGuardia Act, we have taken due account of the railroad's argument that the operation of unnecessary stations, services and lines is wasteful and thus runs counter to the congressional policy, expressed in the Interstate Commerce Act, to foster an efficient national railroad system. In other legislation, however, like the Railway Labor and Norris-LaGuardia Acts, Congress had acted on the assumption that collective bargaining by employees will also foster an efficient national railroad service. It passed such Acts with knowledge that collective bargaining might sometimes increase the expense of railroad operations because of increased wages and better working conditions. It goes without saying, therefore, that added railroad expenditures for employees cannot always be classified as "wasteful." It may be, as some people think, that Congress was unwise in

curtailing the juridiction of federal courts in railroad disputes as it did in the Norris-LaGuardia Act. Arguments have even been presented here pointing to the financial debilitation of the respondent Chicago & North Western Railroad and to the absolute necessity for the abandonment of railroad stations. These arguments, however, are addressed to the wrong forum. If the scope of the Norris-LaGuardia Act is to be cut down in order to prevent "waste" by the railroads, Congress should be the body to do so. Such action is beyond the judicial province and we decline to take it.

There are other subsidiary questions raised with refernce to the validity of a second 30-day restraining order issued by the district judge and an injunction pending appeal under Rule 62 (c) of the Federal Rules of Civil Procedure, 28 U.S.C.A. But since we have determined the main controversy between the parties, we think it inadvisable to decide either of these questions now. We intimate no opinion concerning either at this time.

The judgment of the Court of Appeals is reversed and that of the District Court is affirmed insofar as it held that the court was without jurisdiction under the Norris-LaGuardia Act to enter the injunction. It is so ordered.

Judgment of Court of Appeals reversed and judgment of District Court affirmed in part.

APPENDIX "C"

STATUTES INVOLVED

RAILWAY LABOR ACT, AS AMENDED 48 STAT. 1186, 45 USC, SEC. 151(a); 63 STAT. 107; 45 USC 155 (FIRST):

§ 151a. General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186.

§ 155. Functions of Mediation Board—Disputes within jurisdiction of Mediation Board

First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the followng cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National

Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amiable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

NORRIS-LaGUARDIA ACT, 47 STAT. 70 ET SEQ.; 29 USC 102, 107, 113.

§ 102. Public policy in labor matters declared

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed

with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted. Mar. 23, 1932, c. 90, § 2, 47 Stat. 70.

§ 107. Issuance of injunctions in labor disputes; hearing; findings of court; notice to affected persons; temporary restraining order; undertakings

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in an case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No tem-

porary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity. Mar. 23, 1932, c. 90, § 7, 47 Stat. 71.

§ 113. Definitions of terms and words used in chapter

When used in this chapter, and for the purposes of this chapter—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are em-

ployees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

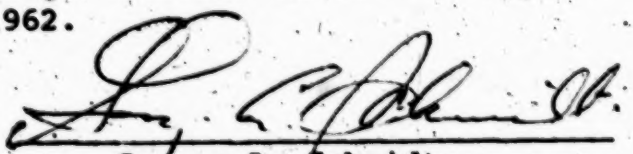
(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia. Mar. 23, 1932, c. 90, § 13, 47 Stat. 73.

CERTIFICATE OF SERVICE

I, George L. Schmidt, attorney for Respondents, do hereby certify that I have furnished two copies of the foregoing Brief For Respondents In Reply to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to Mr. Tom M. Davis, Baker, Botts, Shepherd & Coates, Esperson Building, Houston, Texas; Mr. Palmer Hutcheson, Jr., Esperson Building, Houston, Texas; and Mr. Elmore H. Borchers, Laredo, Texas, by depositing same in the United States mail, properly addressed, with sufficient postage thereon, on the 7th day of December, 1962.



George L. Schmidt

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 589

TEXAS AND NEW ORLEANS RAILROAD COMPANY, ET AL.,
Petitioners,

v.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,
Respondents.

PETITIONERS' REPLY

Contrary to the statement on page 2 of respondents' brief, a very substantial and important question of federal law is presented in this case. Judge Rives and his colleagues viewed this question as one of first impression, the solution of which is "by no means easy." Unfortunately, respondents, in their brief, have so handled (1) the issues, (2) the facts and (3) the law that it is now even more difficult to come to grips with the problem.

Taking these items in order:

1. The Issues

The basic issue presented to this Court is the same as was presented and argued in the courts below,[1] namely:

[1] Respondents, on page 2 of their brief, state that petitioners' questions presented "do not follow" the assignments of error contained in the petition for rehearing filed with the Court of Appeals. This is not so. Compare question 1 presented to this Court with points IV, XII and XIII in the petition for rehearing contained in the transcript of proceedings below filed in this Court, and likewise compare question 2 with points I, IV, V, VI, XII, XIII, and XVI; question 3 with point II; and question 4 with points III and XVII.

Can a railroad union ignore and frustrate an order of the Interstate Commerce Commission[2] approving the establishment of joint terminal operations by petitioners when:

(1) The order was issued pursuant to the "exclusive and plenary jurisdiction" over such matters vested in the Commission by Congress, and

(2) The union, being fully cognizant of the proposals and knowing that the Commission was considering them, and knowing further that some change would be necessary when the bridge was cut, intentionally refrained from exercising the absolute right, vouchsafed to it by Congress, of intervening in the Commission proceedings.

To avoid meeting this issue, respondents have raised the following spurious issues:

a. *Possibility of continuing operations on same basis as before the bridge was cut.* Respondents say no change in method of operations was necessary. This unwarranted contention flies in the face of the facts as found by the District Court and the plain statement of the Court of Appeals, "The question is not, therefore, to change or not to change, but what to change."[3]

b. *Collusion among the railroads.* This inflammatory and frivolous contention is not supported by a single fact in the record or statement in the opinions of the courts below. It is clearly the type of matter which should have been presented, if at all, to the Commission, had respondents not failed to intervene before the Commission, when that body was considering whether or not the proposed joint terminal operations were in the public interest. What respondents are really saying here is that an application to the Commission for approval of joint operations *of any sort* constitutes

[2] Hereinafter sometimes called the Commission.
[3] 307 F. 2d at 161. Petition, p. 18a.

proof of improper collusion *per se*. If this were so Section 5 of the Interstate Commerce Act[4] would be completely nullified and no changes of the sort here in issue could ever be proposed to or approved by the Commission, despite the fact that Congress clearly intended that they be approved when found to be in the public interest.[5]

c. *The permissive nature of the Commission order.* As this Court well knows, Congress, in 1940, amended the Interstate Commerce Act so that the Commission could issue nothing but permissive orders in such cases. Prior to that time the Commission was supposed to originate and impose consolidation and coordination plans. The 1940 amendment left it to the railroads to originate such plans, but the only way they may be effectuated, after all parties have been heard, is through enforcement of the Commission's orders approving the plans found to be in the public interest. But in this case the order was in effect mandatory since the moving cause for the application and the end result of the order was the cutting of the bascule bridge by the City of Corpus Christi which was a party to the Primary Agreement approved by the Commission's order.

d. *Effect of the Railway Labor Act.*[6] Respondents repeatedly state that petitioners violated the RLA. This is not so. The District Court, with all the facts before it, found no such violation, nor did the Court of Appeals.

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[4] 54 Stat. 899, 49 U.S.C. preceding § 1 *et. seq.*

[5] Again we call the Court's attention to section 5(11) of the Interstate Commerce Act which specifically exempts petitioners and their employees, while effectuating an approved consolidation or coordination, from state and federal restrictions such as are contained in anti-trust laws and the Railway Labor Act. See Appendix E in our Petition for Certiorari.

[6] 48 Stat. 926, 45 U.S.C. § 151 *et seq.*

2. The Facts

It is extremely unfortunate that respondents have misstated certain facts and have attempted to mislead this Court. These same misstatements were made to the Court of Appeals and were rejected by that court.

The statements in question are as follows:

a. "They [petitioners] sought to bolster their positions by securing I.C.C. approval of the changes, yet the joint yard and the CCTA operation of the T&NO's port tracks were instituted before even an application with the Commission was filed." (Respondents' brief, page 18.) (Same appears verbatim on page 31 of respondents' brief in the Court of Appeals.)

Prior to argument, it was pointed out to the Court of Appeals that this statement was untrue and was contradicted (1) by the other statements in the Trainmen's brief (the same is true before this Court — see page 5 of respondents' brief), (2) by the stipulation of the parties (Tr. 65), and (3) by the findings of the District Court (Tr. 287-88). The Court of Appeals, in its opinion, stated:

> "*With the bridge cut and the proposed changes approved,* the railroads put the Primary Agreement and supplemental agreements into effect. . . ."[7] (Emphasis supplied.)

Again we quote respondents' brief:

b. "The Petitioners have likewise even ignored their own agreements in their joint train yard operation, which permits joint operations only on specified tracks in the new yards. T&NO and Tex-Mex now jointly operate over Tex-Mex tracks in the whole

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[7] 307 F. 2d at 154. Petition, p. 4a.

> of the Corpus Christi Terminal, thus depriving Tex-Mex employees of their work." (Respondents' brief, page 17.) (Same appears verbatim on page 30 of respondents' brief in the Court of Appeals.)

This statement is directly contradicted by undisputed testimony that the Trainmen did not lose any jobs under the new operations (Tr. 131-33), and by the findings of the trial court that petitioners, when the bridge was cut,

> "*started railroad operations in accordance with the four contracts,* copies of which were attached to the application with the Interstate Commerce Commission *and in accordance with the authority granted by said Commission in its order of November 16, 1960. Operations in such manner have continued to date.*" (Tr. 287-88) (Emphasis supplied.)

The statement is also contrary to the opinion of the Court of Appeals, which states:

> "With the bridge cut and the proposed changes approved, *the railroads put the Primary Agreement and supplemental agreements into effect. . . .*"[8] (Emphasis supplied.).

Again quoting respondents' brief:

> c. "It is apparent from the evidence in this case that the Petitioners have wholly failed to comply with the obligations imposed by the Railway Labor Act in the labor dispute in question to settle the controversy between the parties by making every reasonable effort either by negotiations or with the aid of available governmental machinery of mediation." (Respondents' brief, page 7.) (Same appears verbatim on page 7 of respondents' brief in the Court of Appeals.)

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[8] *Ibid.*

It cannot be denied that petitioners, contrary to the above, made every effort to settle this dispute within the framework of established procedures, and, in fact, did settle with all the unions affected *except* the Trainmen (Tr. 265-66). Further, it cannot be denied that, as the Court of Appeals put it,

> "[I]n May of 1961, the mediation proceedings were terminated, since no agreement could be reached, *and the union [Trainmen] refused arbitration.*"[9]

It is obvious that the facts argued to this Court by respondents are neither the facts proved in the trial court, nor those found by the trial court and restated by the Court of Appeals.

3. The Law

On the principal question here involved, respondents have attempted to trap the Court with a play on words, just as they did the Court of Appeals. Thus respondents have pitched their whole case on the contention that the dispute here is over a change in "working conditions," the settlement of which is governed by RLA procedures. Petitioners do not deny that "working conditions" are involved in-so-far as they are affected by changes in operations such as the establishment of joint terminal operations, and petitioners have always been ready to negotiate on the working conditions, rules and rates of pay affected by these changes, and have reached agreement on these matters with all the unions except the Trainmen. The point is that the dispute here is not over "working conditions," but over the effectuation of a coordination of facilities approved by the Commission. That this matter is not a subject for bargaining or of a "labor dispute" is amply demonstrated by citation of cases and legislative history in our Petition for

[9] *Id.* at 155. Petition, p. 5a.

Certiorari. Since respondents have not seen fit to rebut these citations, we will not repeat them, except for the following, which is from a statement by Mr. McGrath, the Trainmen's General Counsel, before the House Committee considering the enactment of present Section 5 of the Interstate Commerce Act.

> "An acceptance by railroad labor of the provisions concerning unification which are now proposed cannot but be construed as a tacit agreement on the part of railroad employees that mergers, consolidations, coordinations, and so forth, may be freely made, so long as the interests of labor are 'considered' and some sort of supposed protection given to their interests. . . ."[10]

The "provisions concerning unification" to which Mr. McGrath and the Trainmen were opposed in 1939 and 1940 were subjected to bitter and exhaustive debate, but they were enacted into law and the Trainmen's proposal to leave such matters to collective bargaining was rejected.[11]

The authorities cited by respondents are readily distinguishable from the present case.

First, the Commission's decision in Finance Docket 19432, *Chicago, St. Paul, Minneapolis & Omaha Railway Company Lease* cited and relied on by respondents is clearly not in point. In the first place, there were no circumstances compelling North Western to make the lease. It was free to make it or reject it. In our case petitioners were compelled to change their operations at Corpus Christi when the bascule bridge was cut by the City.

In the second place, in approving the lease of Omaha by North Western, the Commission was not asked to approve,

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[10] Hearings on H.R. 2531 and H.R. 1862 before the House Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess. 1292.

[11] See 86 Cong. Rec. 10189.

and did not authorize, an integrated and unified operation of the two lines. However, North Western was trying to obtain labor agreements which would have that effect. As said by the Commission:

> "It is apparent that the Railway Labor Act has not prevented the North Western from effectuating the transaction authorized by the prior order. That order authorized the lease by North Western of the lines of railroad and other properties owned, used, or operated by the Omaha, and this has been accomplished. *The order did not provide any particular method for integration of the physical operations involved. . . .*" (See page 37 of respondents' brief.) (Emphasis supplied.)

In our case petitioners were trying to obtain agreements covering the very manner of operation authorized by the Commission.

In the third place, North Western was asking the Commission to supplement its prior order by prescribing specific procedures which would require North Western and the Trainmen to "concur in a plan of operational revisions." North Western also requested "that express relief be granted from the restraints, limitations and prohibitions of the Railway Labor Act." The Commission held, and rightly so, (1) that it had no authority to order the parties to negotiate and report back to it, and (2) that the terms of Section 5(11) of the Act are *self-executing* and there is no need for the Commission "expressly to order or declare that a carrier be relieved from certain restraints," it being sufficient to specify clearly what the carrier is authorized to do, and thereafter the Courts can and should determine from what restraints the carrier is relieved.

Respondents also rely on *Order of Railroad Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330, and assert that each of petitioners' contentions and arguments in the pres-

ent case was "covered" and "laid to rest" in the *Telegraphers* case. This same statement was made to the Court of Appeals, which, after considering the same, concluded:

> "[S]urprisingly, [this] appears to be a case of first impression."[12]

As the Court of Appeals apparently realized, the *Telegraphers* case is readily distinguishable from our case. As this Court pointed out in its opinion, the demand of the union would not require the railroad in the *Telegraphers* case "to violate any . . . valid order of any public agency."[13] In fact, the *Telegraphers* case did not involve an order of the Interstate Commerce Commission, but rather actions before *state* agencies. On the other hand our case *does* involve a valid order of the Commission covering transactions with reference to which the authority of the Commission is made "exclusive and plenary." Another important difference is that our case, unlike the *Telegraphers* case, involves transactions where Congress has prescribed mandatory protection for employees adversely affected thereby. This provision, as shown by its Congressional history, was adopted as a part of the pattern of railway labor legislation.[14] A further point of difference is that in our case the trainmen have lost no jobs as a result of the consolidation, whereas in the *Telegraphers* case numerous jobs were eliminated.

Nor are any of the other cases cited by respondents either controlling or persuasive here. *Lee Way Motor Freight Inc.* v. *Keystone Freight Lines*, 126 F. 2d 931 (10th Cir. 1942) and *East Texas Motor Freight Lines* v. *International Bhd of Teamsters*, 163 F.2d 10 (5th Cir., 1947) are clearly not in

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[12] 307 F. 2d at 155. Petition, p. 5a.

[13] 362 U.S. at 340.

[14] See Appendices D and E to our Petition for Certiorari.

point. Neither involved Section 5 of the Interstate Commerce Act nor any *specific order or action* by the Commission. Neither involved any provision in the Act which was part of the pattern of labor legislation. There was no need to reconcile the Norris-LaGuardia Act with specific provisions of the Interstate Commerce Act in order to make effective a clearly expressed and subsequently enacted congressional intent appearing in the latter.

With reference to the *East Texas Motor Freight Lines* case, *supra*, and *W. L. Mead, Inc.* v. *International Bhd of Teamsters*, 217 F. 2d 6 (1st Cir. 1954), this Court stated in *Brotherhood of Railroad Trainmen* v. *Chicago River and Indiana R. Co.*, 353 U.S. 30 at page 42:

> "The Brotherhood has cited several cases in which it has been held that the Norris-LaGuardia Act's ban on federal injunctions is not lifted because the conduct of the union is unlawful under some other statute. We believe that these are inapposite to this case. *None involved the need to accommodate two statutes, when both were adopted as a part of a pattern of labor legislation.*" (Emphasis supplied.)

The foregoing applies equally to all the cases cited by respondents. Each is distinguishable from our case for the following reasons:

1. None involved a choice between either the defeat of a clearly expressed, specific federal policy enunciated in an Act of Congress passed after the enactment of Norris-LaGuardia, or the reconciliation of that policy with Norris-LaGuardia.

2. None involved an effort by a union, through strike action or otherwise, to nullify a specific order issued by the Commission under Section 5 of the Act.

3. None involved a determination whether a union can strike to nullify an authorization granted by a federal agency whose jurisdiction in the premises Congress has declared to be "exclusive and plenary."

The foregoing comments apply to the above cases and to *Afran Transport Co.* v. *National Maritime Union*, 169 F. Supp. 416 (D.C.S.D. N.Y. 1958); *Alcoa S. S. Co., Inc.* v. *McMahon*, 173 F. 2d 567 (2d Cir. 1949); *Arnold* v. *Louisville & N R. Co.*, 180 F. Supp. 429 (D.C.M.D. Tenn. 1960); *A. H. Bull S.S. Co.* v. *Seafarers' Int'l Union*, 250 F. 2d 326 (2d Cir. 1957); *Butte, A. & P. Ry. Co.* v. *Brotherhood of Locomotive Firemen and Engineers*, 268 F. 2d 54 (9th Cir. 1959).

* * *

In enacting Section 5 of the Interstate Commerce Act in 1940, Congress acted with great prescience. The solutions provided therein for the resolution of problems arising from consolidation and coordination of railroad operations recognized the interest of the public in such matters as well as the interests of the brotherhoods and the railroads. Thus Congress provided specifically that consolidations of facilities such as the establishment of joint terminal facilities should be aired in a tripartite forum before being put into effect. The Commission was directed to consider all matters of *public* interest involved. At the same time both the brotherhoods and the railroads were accorded the absolute right to participate in the deliberations and assert their views. Further, and most important, Congress ringed the whole procedure with provisions designed, as Representative Wolverton said, to give,

> "railroad workers protection against sudden dismissal and financial assistance that is not enjoyed by workers in any other industry."[15]

Respondents' disregard of the legislative history of Section 5 cited by petitioners is an eloquent testimonial to the force with which that history supports petitioners' case. The Trainmen are not unaware of this history, since they

[15] 86 Cong. Rec. 10189.

were primarily responsible for the difficulty President Roosevelt and his proponents in Congress had in achieving the enactment of Section 5. Their silence before this Court is understandable since they *lost* their battle in Congress to leave all matters covered by Section 5 to collective bargaining — yet they hope to achieve that very same result in this case.

The exclusive and plenary jurisdiction granted to the Commission by Congress was granted only after long and careful deliberation. It should not be withdrawn summarily. If it is, the public interest is left without a champion, and the determination of these important matters which Congress thought it had vested in the Commission will be relegated to the arena of economic force.

CONCLUSION

Petitioners respectfully request that Certiorari be granted.

Respectfully submitted,

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